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### Tribes as Rich Nations

Raymond Cross

University of Montana School of Law, [ray.cross@umontana.edu](mailto:ray.cross@umontana.edu)

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### Recommended Citation

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## Tribes as Rich Nations

"If you have understanding and heart, show only one.  
Both they will damn, if both you show together."<sup>1</sup>

Emancipating today's American Indian peoples requires a fundamental restructuring of the contemporary concept of tribal self-determination. Bound by their legal status as tribes, assigned to them by Supreme Court opinions now almost 200 years old, the Indian peoples are crippled by governing rules of law that prevent them from realizing any meaningful measure of self-determination. By resymbolizing the Indian peoples as "tribes," Chief Justice John Marshall's opinion in *Johnson v. McIntosh*<sup>2</sup> incorporated aboriginal Indian land titles into fee simple federal ownership, effectively subordinating the Indian peoples to paramount federal authority.<sup>3</sup> Hundreds of linguistically, cul-

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\* Professor of Law, School of Law, University of Montana. J.D., 1973, Yale Law School; M.P.A., 1989, Harvard University.

<sup>1</sup> J.C.F. Holderlin

<sup>2</sup> 21 U.S. (8 Wheat.) 543 (1823). Justice Reed later described Marshall's opinion in *Johnson* as rationalizing the subordinate legal status of the Indian peoples. See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279-91 (1955). He candidly admitted in his opinion that America's nineteenth century dream of a manifest destiny would not have been realized but for the *Johnson* decision. Justice Reed also bluntly acknowledged the spurious logic by which Marshall extended preemptive federal title over a vast expanse of Indian lands in the trans-Mississippi region that were occupied by numerous and powerful Indian peoples who were prepared to militarily contest the United States' claimed ownership of their lands. *Tee-Hit-Ton Indians*, 348 U.S. at 279.

<sup>3</sup> Professor Stephen Cornell argues that the "tribe" was created by those European and American negotiators "who searched for and often assumed comprehensive structures of authority or hierarchical political organization" among the Indian peoples. STEPHEN CORNELL, *THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE* 78 (1988). Indeed, Cornell concludes that "[c]omprehensive political organization at times was even made a prerequisite for [federal] negotiations" with the Indian peoples. *Id.* at 79.

Marshall's process of incorporating the Indian peoples and their lands within the American domestic sphere of control was accomplished over the course of his opinions in what is popularly called Marshall's Indian Law Trilogy: *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823) (incorporating aboriginal Indian land titles into fed-

turally and economically distinct indigenous peoples were assimilated as tribes into the American domestic sphere of control. Their ostensible sharing of a tribalistic existence helped rationalize Marshall's recharacterizing of fiercely independent and self-sufficient Indian peoples as "domestic, dependent nations" legally subject to paramount federal control.<sup>4</sup>

Marshall's Indian legal opinions repainted, in a monochrome reddish tint, the diverse indigenous map of North America so as to project federal sovereignty over millions of acres of Indian lands, especially in the hotly-contested terrain west of the Mississippi River.<sup>5</sup> Vast areas of the American West were "up for

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eral ownership); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) (denominating Indian peoples as "domestic, dependent nations"); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (establishing an exclusive, bilateral relationship between the federal government and the Indian peoples).

<sup>4</sup> Ernest Wallace and Adamson Hoebel likewise emphasize that the "tribe," as a distinct legal or political entity, did not exist among the Indian peoples:

"Tribe" when applied to the Comanche is a word of sociological but not political significance. The Comanches had a strong consciousness of kind. A Comanche, whatever his band was a Comanche. By dress, by speech, by thoughts and actions the Comanches held a common bond of identity and affinity that set them off from all other Indians—from all the rest of the world. In this sense the tribe had meaning. The tribe consisted of a people who had a common way of life. But that way of life did not include political institutions or social mechanisms by which they could act as a tribal unit.

CORNELL, *supra* note 3, at 75 (quoting ERNEST WALLACE & E. ADAMSON HOEBEL, *THE COMANCHES: LORDS OF THE SOUTH PLAINS* 22 (1952)).

Nonetheless, no indigenous peoples of America, despite their long history as settled, agricultural and civilized Indians, were immune from becoming "tribal" in character and thus subject to paramount federal control. The Pueblo Indians of the American southwest, once judicially deemed civilized and beyond federal control, had by the early twentieth century sunk into a "tribalistic" status that warranted federal control of their lands and members. The Supreme Court concluded that the "people of the pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are nevertheless Indians in race, customs, and domestic government." *United States v. Sandoval*, 231 U.S. 28, 39 (1913). Their "tribalism" was further evidenced by their "primitive modes of life . . . influenced by superstition and fetichism, and chiefly governed [by] . . . crude customs inherited from their ancestors, they are a simple, uninformed and inferior people." *Id.* (extending exclusive federal control over the Pueblo peoples and their lands).

<sup>5</sup> Noted Indian historian Wilcomb E. Washburn asserts that Marshall recognized that "title to the real estate of the nation," as well as the "economic and political demands of the millions [of non-Indians] who now populated the continent," hinged upon his opinion in *Johnson*. WILCOMB E. WASHBURN, *RED MAN'S LAND/WHITE MAN'S LAW* 65-66 (2d ed. 1995).

Equally noted Indian historian Francis Jennings explains the immense transformation of Indian America wrought by *Johnson* as evidencing the "transit of civilization." This civilization brought with it European weeds—the ferns, thistles, plantain,

grabs,” and the Marshall Court sought to stake the federal government’s claim to as much of that land as it could wrest from competing European nations. Reducing the Indian peoples to tribal status was merely one step in this unfolding process of American Manifest Destiny.<sup>6</sup> But this federal process of tribalizing the Indian peoples soon spilled over into their daily lives, locking the newly created tribal members into a *sui generis* legal status as wards of the federal government.<sup>7</sup>

Emancipating today’s Indian peoples requires a self-determination strategy that will free them from the constraints of their assigned legal status. However, a substantial federal superstructure has grown up around this status and conspires to make its dismantlement extremely difficult. It is composed of debilitating 19th century federal Indian law principles, the deep socio-economic disadvantages that prevent tribal members from fairly participating in today’s American society and the vested non-Indian interests which oppose any meaningful program of tribal self-determination. It is not surprising that tribal self-determination, as presently conceived and implemented, has made little contribution to the emancipation of today’s Indian peoples from those many omnipresent economic and social ills that have made a

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nettles, nightshade sedge—and took away for European use Indian foodstuffs—maize, potatoes, tomatoes, chilies, and yams. FRANCIS JENNINGS, *THE FOUNDERS OF AMERICA: FROM THE EARLIEST MIGRATIONS TO THE PRESENT* 25-35 (1993).

<sup>6</sup> Ironically, President George Washington and War Secretary Henry Knox both emphasized respect for the Indian peoples’ aboriginal land titles and rights. President Thomas Jefferson described the federal government’s preemptive right in the Indian peoples’ lands:

not as amounting to any dominion or jurisdiction, or paramountship whatever, but merely in the nature of a remainder after the extinguishment of the present right, which gave us no present right whatever, but of preventing other nations from taking possession, and so defeating our expectancy; that the Indians had the full, undivided and independent sovereignty as long as they choose to keep it, and that this might be forever.

<sup>7</sup> 1 FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 59 (1984).

<sup>7</sup> The ambiguous legal status of individual Indians has occupied the federal courts’ attention since the beginning of the federal-tribal relationship. Early federal court decisions interpreted the Fourteenth Amendment’s blanket grant of citizenship to “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof” as excluding Indians. *McKay v. Campbell*, 16 F. Cas. 161, 165 (D. Or. 1871). The Supreme Court later adopted that reasoning, holding that an individual Indian could not free himself from his tribal status by self-help through his voluntary adoption of non-Indian ways of living. *Elk v. Wilkins*, 112 U.S. 94 (1884) (holding that Indians are “not subject to the jurisdiction” of the United States nor citizens of the U.S. or the states within which they reside). *Id.* at 109.

mockery of self-determination's promise within Indian Country.<sup>8</sup>

My goal is to critique the contemporary doctrine of tribal self-determination thirty years after its inception in President Richard M. Nixon's famed 1970 Indian Message to Congress.<sup>9</sup> I focus on the three most prominent strategies for tribal self-determination. First, I evaluate the tribal strategy that seeks to "morph" their inherent and reserved sovereign powers into tribal regulatory powers that are effective throughout Indian Country. Second, I assess the tribal strategy that seeks to develop and assert economic sovereignty over their lands, resources and commercial relationships as a means of revitalizing Indian Country. Third, I critique the tribal strategy that seeks to reassert traditional cultural and religious beliefs and practices as a means to regenerate their societies within Indian Country.

I also compare two rival perspectives on the future of tribal self-determination. First, I describe and evaluate what I call the standard model of tribal self-determination within Indian Country. I conclude that this model holds promise only for that relatively small minority of tribes who view wealth creation as the central feature of their self-determination effort and are willing to fundamentally reshape their traditional institutions and beliefs to realize that goal. Second, I describe and evaluate what I call the transcendent model of tribal self-determination within Indian Country. I conclude that this approach to tribal self-determination may hold greater promise for those tribes who value cultural renewal and social revitalization as the central feature of their tribal self-determination effort.

Given that the tribe, that legal entity created by Marshall's Indian legal opinions, occupies the "design-space"—the legal, economic, and social potentials and possibilities imagined and

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<sup>8</sup> The poverty rate of the American Indians in 1980 was 40.5%, almost six times that of the white population. A regional breakdown of the United States shows that in those regions where the proportion of reservation Indians is the highest, the Indian poverty rate is most severe. KLAUS FRANTZ, *INDIAN RESERVATIONS IN THE UNITED STATES: TERRITORY, SOVEREIGNTY AND SOCIOECONOMIC CHANGE* 108 (1999).

<sup>9</sup> President Nixon's 1970 Indian Message emphasized that the "time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions." Message From The President of the United States Transmitting Recommendations for Indian Policy, H.R. Doc. No. 91-363, at 1 (1970).

Nixon's message goes on to say "that we must make it clear that Indians can become independent of federal control without being cut off from federal concern and support." *Id.*

encountered by the Indian peoples—of self-determination, a brief historical account of the life-cycle of the tribe is in order.

### A. *The Life-Cycle of the Tribe*

Understanding the historic life-cycle of the tribe—its birth, its infancy, its adolescence, its untimely death at the hands of federal Indian policy makers and its surprising rebirth—is essential for the successful reconstruction of tribal self-determination.

#### 1. *Birth*

Chief Justice Marshall birthed the tribe out of a primal source that he called “the actual state of things.”<sup>10</sup> This pastiche of historical, cultural, economic and geographic circumstances was orchestrated by Marshall so as to define an exclusive, bilateral relationship between the federal government and those indigenous peoples who were resident in America at the time of European Discovery.<sup>11</sup> Once fully sovereign peoples, they were reduced, by the operation of Marshall’s “actual state of things,” to “domestic dependent nations.”<sup>12</sup> Their new status under

<sup>10</sup> Professor Rob Williams excoriates Marshall’s “actual state of things” as a trumped-up historical explanation justifying total federal control over the Indian peoples and their lands. Robert A. Williams, Jr., *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence’s Learning to Live with the Plenary Power of Congress over the Indian Nations*, 30 ARIZ. L. REV. 439, 440-42 (1988).

<sup>11</sup> See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). The *Worcester* decision—as the leading historian of the Marshall Court, Professor G. Edward White, points out—did not, however, alter one iota the “plight” of the Cherokees or any of the other Eastern Indian peoples in America during the 1830s:

The Cherokees, and other Indian tribes, became in effect wards of the federal government. The officials of that government were acknowledged to have the power to do what Georgia had done: place the Indians in the position of abandoning their cultural heritage—becoming “civilized”—or being dispossessed of their land and forced to emigrate. Being wards of the federal government did not mean the Indians in America would have more freedom or more respect. Their “plight,” ostensibly solved, remained essentially the same.

DAVID GETCHES ET AL., *FEDERAL INDIAN LAW* 125 (4th ed. 1998), (citing G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE*, 1815-35, at 732 (1988)).

<sup>12</sup> See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). The *Cherokee Nation* decision, in the opinion of Professor G. Edward White, represents the Marshall Court’s stark awareness of the precarious practical status of the Eastern Indian peoples:

The policy of removal . . . and the dire consequences for the [Eastern] Indian population precipitated a growing concern among a segment of educated nineteenth-century Americans for what they termed the “plight” of

American law, intermediate between that of a foreign nation and that of a purely voluntary association of individuals, Marshall denominated a "tribe."<sup>13</sup>

To Marshall's credit as midwife to the tribe, he resisted the counsel of those who said that he should abort its delivery. They argued that it would be an illegitimate birth, born from an illicit liaison between a suspect legal father, a dubious interpretation of a discredited sixteenth-century European Doctrine of Discovery, and a querulous mother, the oddly-crafted Indian Commerce Clause of the U.S. Constitution.<sup>14</sup> Only a wildly mischievous child would result from this union, one who would wreak discord within America's tightly-knit, constitutionally-structured nuclear family. Those legitimate members of that family—the states, the federal government and the American people—critics warned, would come to resent Marshall's imposition of over 500-plus "shirt-tail" relatives, the tribes.<sup>15</sup> These uncouth American rela-

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the Indians . . . caused by their inability to acculturate. . . . Most could not adapt to white customs and institutions: they lacked the inherent qualities of republican yeoman. While civilizing Indians was preferable to dispossessing them, for humanitarian and paternalistic reasons, the civilizing process did not take in most cases. The result was a "plight": dependency and poverty or emigration and dispossession.

GETCHES ET AL., *supra* note 11, at 102-03.

<sup>13</sup> Marshall "contradistinguished [the Indian peoples] by a name appropriate to themselves" and that name is "tribe." *Cherokee Nation*, 30 U.S. (5 Pet.) at 18. Stephen Cornell suggests that by "tribalizing" the Indian peoples, Marshall may have been promoting their political maturation:

[T]ribalization could have advantages for Indians. They, too, had political agendas; they also were in pursuit of peace, secure borders, access to resources available only from their adversaries. Centralized political structures, often including new leadership positions, had advantages in dealings with European and American governments and their representatives. As such dealings came to play a larger role in Indian life, specialized political organization became increasingly advantageous. It also offered opportunities to ambitious individuals or factions seeking to expand their influence or power.

CORNELL, *supra* note 3, at 79.

<sup>14</sup> There are just *Indians*, no tribal nations, according to Justice Johnson in his concurring opinion in *Cherokee Nation*, 30 U.S. (5 Pet.) at 25 (Johnson, J., concurring). These Indians, Johnson concluded, are "nothing more than wandering hordes, held together by ties of blood and habit, and having neither laws or government beyond what is required in a savage state." *Id.* at 27. He warned the Court that to recognize "every petty kraal of Indians, designating themselves a tribe or nation" would do great harm to the established political fabric of the United States. *Id.* at 25. The ongoing economic and political maturation of the Indian peoples and their "advance, from the hunter state to a more fixed state of society," would undermine both the federal and state governments' control of Indian lands and status. *Id.* at 23.

<sup>15</sup> This mischief was already afoot, according to Justice Johnson, giving the federal

tives would likely clamor for a place at the American family table and only disharmony would result from forcing the states and the American people to welcome the tribes to their table.<sup>16</sup>

Marshall's reasons for birthing the tribe remain cloudy and ambiguous. Some language in his opinions arguably contemplates the future growth and development of the tribe into a mature American government.<sup>17</sup> But realizing this possibility, given Marshall's characterization of the tribe as fundamentally inferior in socio-cultural capabilities, would require the overthrow of Marshall's famed Trilogy of Indian law opinions.<sup>18</sup> His Indian law model has resulted in the birth of 500-plus, federally-recog-

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policy of "extend[ing] to [the Indian peoples] the means and inducement to become agricultural and civilized." *Id.* at 23. But he concluded that the ultimate project of organizing the Indian peoples into "states" could not possibly be accomplished without "express authority from the states." *Id.* at 24.

On this point, Indian historian Francis Jennings would agree. Jennings argues that under the social and political conditions of the nineteenth century the "nation-state" grew by "dissolving" the Indian peoples. JENNINGS, *supra* note 5, at 364.

<sup>16</sup> Justice Baldwin agreed with Justice Johnson's concurring opinion in *Cherokee Nation* regarding the mischief that would be created by recognizing any residual sovereignty in the Indian peoples after their incorporation into the United States. "Within [Georgia's] boundaries there can be no other nation, community, or sovereign power, which this department can judicially recognize." *Cherokee Nation*, 30 U.S. (5 Pet.) at 47 (Baldwin, J., concurring).

Likewise, theorizing about Indian rights played little role in the thinking of the non-Indian settler or speculator of the eastern Indian lands. Prucha remarks that "they saw the rich lands of the Indians and they wanted them." PRUCHA, *supra* note 6, at 108.

<sup>17</sup> Marshall's task in *Johnson* was to:

[C]onsider not only law but conscience and expediency as well. The "natural" rights of the Indians had to be seen in terms of the "speculative" rights of the earlier European monarchs, the "juridical" rights of their successor American states, and the "practical" economic and political demands of the millions who now populated the continent.

WASHBURN, *supra* note 5, at 66.

<sup>18</sup> Noted Marshall scholar, G. Edward White, describes Marshall's difficulty in *Johnson*, and related Indian law opinions, as arising from the distinct legal principles that he applied to define the Indian peoples' legal status:

The Indians had been the initial possessors of the American continent: the land and, presumably, the property rights emanating from it were theirs . . . . The Indian tribes had been recognized from the outset of white settlement as nations and had entered into legal relationships, such as treaties or contracts, with whites. Theoretically, then, Indian tribes holding land had not only rights of sovereignty but a bundle of natural rights deserving of legal recognition, rights related to the concepts of liberty, property, and self-determination that occupied so exalted a position in early-nineteenth-century jurisprudence.

G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835*, at 704 (abr. ed. 1991).



nized Indian tribes, bands and groups, who today reside within an Indian Country that represents but a tiny fraction of their aboriginal territorial domain. Despite the precatory language in Marshall's opinions, urging the American nation to assume, as guardian, the exceptional burden of protecting and civilizing the "tribe," history has recorded only the hollowness and futility of his high-flown metaphors and flowery praise of the indomitable character of Indian peoples. While the federal government exploited Marshall's Indian law opinions as the means to extend American sovereignty from sea-to-sea, it did not work equally assiduously to protect or civilize its wards, those Indian peoples who came to be regarded as barriers to western settlement and development.<sup>19</sup>

## 2. *Childhood*

Other American leaders—such as Presidents Washington, Jefferson and Jackson—were tasked with implementing Marshall's concept of the tribe in political and diplomatic terms. How should the federal government deal with this mischievous child, the tribe? President Washington did so by resymbolizing the tribe as the "wolf-child." Tribal treaty-making and Indian diplomatic relations were his means of temporarily accommodating their putative child-like whims, caprices and limited subsistence needs.<sup>20</sup> Federal military force would be used as "predator-control" against those tribes who responded as "wolf" in raiding or killing American settlers along the frontier.<sup>21</sup> Washington saw

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<sup>19</sup> The United States' ongoing commitment to the civilization and protection of the Indian peoples is evident from its early proclamation in the Northwest Ordinance of 1787: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, and the means of education shall be forever encouraged. The utmost good faith shall always be observed towards Indians." Northwest Ordinance of 1787, 1 Stat. 50, 52 (1789).

But consensus Indian historians agree that the federal government's "civilizing agenda" was never carried out with any of the Indian peoples. See Clyde Ellis, "A Remedy for Barbarism": *Indian Schools, the Civilizing Program, and the Kiowa-Comanche-Apache Reservation, 1871-1915*, 18 AM. INDIAN CULTURE & RES. J. 85 (1994).

<sup>20</sup> Washington emphasized that "policy and [economy] point very strongly to the expediency of being upon good terms with the Indians." Letter from George Washington to James Duane (Sept. 7, 1783), GETCHES ET AL., *supra* note 11, at 84-85.

<sup>21</sup> Washington's Indian policy, which pledged to protect the Indians' homelands while seeking to survey, sell and create non-Indian political institutions in those very same lands, "had moved beyond contradiction, to schizophrenia," according to historian Elliot West. ROBERT V. HINE & JOHN MACK FARAGHER, *THE AMERICAN WEST: A NEW INTERPRETIVE HISTORY* 121 (2000).

the tribes as naturally retreating west, like wolves, along with their prey—the big game animals—who understandably fled west before the encroaching American line of settlement.<sup>22</sup> Given the tribes' rapidly declining military powers and populations, as well as their voluntarily or federally-assisted retreat west of the Mississippi River, Washington and other federal leaders assumed that they would never have to set a place at the American table for these unruly children, the tribes.<sup>23</sup>

The tribe as perpetual "wolf-child." No wonder why Huck Finn and Tom Sawyer, American literature's most famous juvenile delinquents, openly envied the lives of the Indian peoples in the mythical Indian territory.<sup>24</sup> They were the most fervent believers in the growing American myth of the tribe. They—along with countless other boys throughout Europe and America—hoped against hope that this myth would remain forever true—that the tribe would remain spatially and spiritually far beyond the reach and taint of American civilization.<sup>25</sup>

Pragmatically, Marshall's tribe served as a protean policy device, content-empty and to be filled in by future federal governments as the tribe's guardian. By revisioning the tribe's role as America's ward, future federal guardians could resolve any emerging contradictions or paradoxes created by the American people's changing attitudes towards the Indian peoples and their need for more Indian land. This device supported the American people's growing conviction that the dwindling tribes should not be entitled to assert exclusive sovereignty over vast expanses of

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<sup>22</sup> Washington thought that "[s]ettlements will as certainly cause the Savage as the Wolf to retire, both being beasts of prey tho' they differ in shape." GETCHES ET AL., *supra* note 11, at 85.

<sup>23</sup> *Id.*

<sup>24</sup> Ironically, Mark Twain's campaign to demolish the "Noble Savage" stereotype created by James Fenimore Cooper and Francis Parkman is well known. He criticized these writers as "viewing him [the Indian] through the mellow moonshine of romance." PHILIP S. FONER, *MARK TWAIN SOCIAL CRITIC* 237 (1958).

Nonetheless, he scandalized the annual dinner of the New England Society in 1881 stating: "My first American ancestor, gentleman, was an Indian, an early Indian. . . . Your ancestors skinned him alive, and I am an orphan." *Id.*

<sup>25</sup> Leatherstocking, James Fenimore Cooper's fictional backwoodsman, speaking in 1826 already condemns the extension of American civilization in the wilderness of Indian Country. Cooper has him decry Judge Temple's vision of building in the forests, "towns, manufactories, bridges, canals, mines, and all the other resources of an old country." HINE & FARAGHER, *supra* note 21, at 476. Leatherstocking argues against civilization saying, "[T]he garden of the Lord was the forest" and was not patterned after the "miserable fashions of our times, thereby giving the lie to what the world calls its civilizing . . ." *Id.*

hunting and roaming lands that could easily accommodate thousands of non-Indian farmers, ranchers and future industrialists.<sup>26</sup>

### 3. *Adolescence*

Huck Finn and Tom Sawyer routinely threatened to “light out to Indian Territory” to escape their Aunt Polly’s rigid brand of the Protestant work ethic.<sup>27</sup> Many real Americans and Europeans did just that beginning in the 1830’s. Their shared motivation was to escape the dreary constraints of the school-house, work-house, jailhouse and business firm. This led countless European and American artists, writers, mountain men and criminals to flee to Indian Country.<sup>28</sup> Add to that influx those many escaped African-American slaves who found a different type of emancipation among the tribes, and you will see why so many non-Indians had a stake in maintaining Marshall’s myth of the tribe.<sup>29</sup>

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<sup>26</sup> John Sevier’s natural liberties philosophy served to legitimate the aggressive attitudes of the frontiersmen. He argued that the “law of nations . . . agree[s] that no people shall be entitled to more land than they can cultivate.” PRUCHA, *supra* note 6, at 108. His frontiersman’s philosophy triumphed because the federal government made only sporadic and feeble military efforts to regulate the non-Indian pressure to settle Indian lands. *Id.* at 111-12.

<sup>27</sup> See generally FONER, *supra* note 24, at 236-38.

<sup>28</sup> The American frontier had spawned a subculture of a breed of lawless, sometimes depraved, men who lived off clandestine trade with the Indians. The Indian fur trade literally created these men who went off with their packs for months on end into the wilderness. Paul Prucha emphasizes that though they often took Indian wives, they nonetheless “mercilessly exploited the Indians, debauched them with whiskey, and robbed them of their furs.” PRUCHA, *supra* note 6, at 95.

By contrast, the authentic portrayal of the vanishing Indian way of life on the Great Plains is what motivated painters such as Samuel Seymour, George Catlin and Karl Bodmer to make the dangerous trek into Indian Country. Seymour’s goal was to paint portraits of Indians and reproduce landscapes noted for their “beauty and grandeur.” Catlin avowed that “nothing short of the loss of my life shall prevent me from . . . becoming [the Indians’] historian.” HINE & FARAGHER, *supra* note 21, at 481. He had “flown to their rescue—not of their lives or of their race (for they are ‘doomed’ and must perish), but to the rescue of their looks and their modes.” *Id.* at 482. Bodmer, who accompanied Prince Maximilian on his visits to the Mandan villages of the Upper Missouri River, used his painting skills to provide an artistic accompaniment to his patron’s ethnographic writings. His paintings are used today in reconstructing the traditional clothing, rituals and life-ways of his Indian subjects. *Id.* at 482-83.

<sup>29</sup> “[Slaves who lived near] the Indian nations . . . frequently tempted fate by striking out for freedom.” JOHN HOPE FRANKLIN & LOREN SCHWENINGER, *RUNAWAY SLAVES: REBELS ON THE PLANTATION* 25 (1999). Professor Franklin asserts that these runaway slaves were “more likely to head for the [Indian nations than] the [ostensibly free area of] Ohio.” *Id.* at 121.

What did all these non-Indian escapees to Indian Country have in common? They sought to restore a palpable freedom, drama and challenge to lives that had grown cold and predictable under civilization's weight.<sup>30</sup> But it was the brief flowering, during the short-lived adolescence of the tribe, of the "horse and gun" Great Plains Indian culture that truly cemented the American myth of the tribe.<sup>31</sup> The Cree and Ojibway had received the horse and the gun from French fur traders in the early 1800s. This newly available technology spread rapidly to the tribes of the Great Plains, the horse giving them mobility and the gun giving them firepower. These two technologies combined to create a tribal "high-culture" period during which the Great Plains Indian peoples lived lives organized around raiding, inter-tribal warfare and buffalo hunting.<sup>32</sup> With the horse and the gun they were also able to seriously impede, if not completely stem, the illegal incursion by thousands of non-Indians who crossed the Great Plains en route to Oregon and California, killing the buffalo and other big game as they went.<sup>33</sup>

The cycle of Indian treaties negotiated by President Johnson's Indian "Peace Commission" between 1867 and 1868 guaranteed many of the Great Plains tribes the "exclusive use and occu-

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He also quotes a federal military officer stationed in south Georgia in the early nineteenth century who asserts that he "[has] ascertained beyond any doubt [that] a connection exists between a portion of the slave population and the Seminoles" so as to facilitate Indian raids on the plantations. *Id.* at 87.

<sup>30</sup> Teddy Roosevelt, after the death of his wife in childbirth, left his baby daughter in the care of family members and headed to the Dakotas to live for three years on a cattle ranch. His motive was to feel the "beat of hearty life in our being . . . the glory of work and the joy of living." HINE & FARAGHER, *supra* note 22, at 496.

Likewise Owen Wister, the famous writer, went west to regain his health and to "[free] himself from what to him was a deadly life" as a Boston businessman. *Id.* at 497.

<sup>31</sup> Horses, either stolen by Indians from the Spaniards or re-domesticated by them from the wild, appealed strongly to the Plains Indians. So strongly, in fact, that Professor Francis Jennings concludes that the horse "stimulate[d] revolutionary cultural change from sedentary horticulture to the mobility of hunters and raiders of 'horse Indian' fame." JENNINGS, *supra* note 5, at 166.

<sup>32</sup> Professor Hine argues that the horse allowed the "Indian peoples to reclaim the . . . American heartland" and become the "first settlers of the Great Plains. . . ." HINE & FARAGHER, *supra* note 22, at 138.

Thus, the "mounted warrior of the plains—the ubiquitous and romantic symbol of native America—was in fact not an aboriginal character at all but one born from the colonial collision of cultures." *Id.*

<sup>33</sup> Killing the bison, Professor Jennings concluded, was seen by the non-Indians as a "quick way of getting rid of the Indians who were also conceived of as vermin." JENNINGS, *supra* note 5, at 372.

pancy" of their vast hunting and roaming areas.<sup>34</sup> But as a practical matter, the federal government proved both unable and unwilling to protect tribal lands from non-Indian intrusion.

The federal government sought instead in the 1870s to renegotiate these treaties so as to require the tribes to give up their nomadic way of life in favor of farming and ranching. But this suggestion was particularly objectionable to those tribes who saw farming as suitable employment only for women or the disabled. Other tribes saw farming as sacrilege and disrespectful of the earth itself. Not surprisingly, few tribes agreed to voluntarily settle down and forego hunting, raiding and roaming in their traditional areas and during their traditional seasons.<sup>35</sup> This blatant tribal resistance to "growing up" justified, according to federal policy makers, the use of military force to settle the recalcitrant tribes on newly-established Indian reservations.<sup>36</sup>

Forcing the resistant Great Plains tribes onto reservations proved to be easier said than done. They rarely had much trouble escaping the army columns sent to round them up.<sup>37</sup> Entire camps, including women, children and the elderly, proved elusive targets in terrain where an unobserved approach by an army column was extremely difficult. If the troops pressed too closely, the Indians would disperse, forcing the army commander to either give up pursuit or persist against a steadily diminishing target.<sup>38</sup>

But, despite the tribes' successful guerrilla tactics, the tide slowly turned against their continued resistance. Federal soldiers would routinely destroy the camp equipment and household materials of those Indians who fled to escape reservation life. They would likewise seize or destroy the Indian pony herds they captured.<sup>39</sup> Combined with the ongoing, non-Indian slaughter of

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<sup>34</sup> Marshall's Indian law decisions and later federal Indian treaties confirmed the Indian people's exclusive use and occupancy rights in vast hunting and roaming reserves in the American West. CORNELL, *supra* note 3, at 45-50.

<sup>35</sup> Few Indian peoples tried to adopt agriculture because, among other reasons, they had been "pushed into places where soil was poor and water was scarce." JENNINGS, *supra* note 5, at 372.

<sup>36</sup> That the Indians who wiped out Custer's troops did so in defense of their families is crystal clear to Professor Francis Jennings. "[B]ullheadedly disregarding warnings and defying orders," Custer was "on the way to perpetrate another in a series of his own [Indian] massacres." *Id.* at 377.

<sup>37</sup> WILLIAM T. HAGAN, *HOW THE WEST WAS LOST, INDIANS IN AMERICAN HISTORY* 182 (Frederick E. Hoxie ed., 1988).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 183.

the buffalo for their hides in the 1870s, there was little hope that the Great Plains tribes could long maintain their war of resistance against the federal government.<sup>40</sup>

By recharacterizing those tribes who resisted reservation settlement as savages and malcontents, the federal government sought to mobilize American public sentiment in favor of its ruthless "search and destroy" military missions. Ironically, it was just one such mission that resulted in the tribes' greatest military triumph over federal army troopers. On June 25, 1876, at the Battle of the Little Bighorn, the combined Indian forces of Sioux and Cheyenne warriors killed over half of the army troopers in the Seventh Cavalry Regiment.<sup>41</sup> This Indian victory spawned a wave of American vengeance against any tribe that resisted settlement on a reservation under the watchful eye of federal troops.<sup>42</sup>

Resymbolized as unfeeling, bloodthirsty savages who understood and respected only greater cruelty than they could inflict, the Indian peoples were successfully recharacterized by the federal government in a new light.<sup>43</sup> No longer the impulsive, willful child who had to be placated with flowery promises and cheap trinkets, the Indian had been recast as the malevolent "other." It was he—the treacherous, unscrupulous red-devil who raped

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<sup>40</sup> *Id.* at 184.

<sup>41</sup> JENNINGS, *supra* note 5, at 377.

<sup>42</sup> The military subjugation of the Apaches, Sioux and Nez Perce by the federal cavalry in the 1870s marked the effective end of armed Indian resistance on the Great Plains and in the Far West. The collapse of Indian military might left the Indian peoples vulnerable to retributive congressional action and the pressures of treaty negotiators. Cornell cites the words of Shoshone Chief Washakie in 1878 as the closing eulogy of this era: "Our fathers were steadily driven out, or killed, and we, their sons, but sorry remnants of tribes once mighty, are cornered in little spots of the earth all ours by right—cornered like guilty prisoners and watched by men with guns." CORNELL, *supra* note 3, at 50.

<sup>43</sup> The portrayal of the Indian as killer was abetted by the writers of the dime novels who produced an "objectified mass dream" that mapped the fixations of their readership on "savage redskins, vicious greasers and heathen Chinese" who were routinely "laid low" by conventional white heroes. HINE & FARAGHER, *supra* note 21, at 478.

But it was Teddy Roosevelt in his multi-volume work, *Winning of the West*, who officially legitimated this view of the Indian as unredeemably cruel and treacherous:

Not only were they very terrible in battle, but they were cruel beyond all belief in victory. . . . The hideous, unnameable, unthinkable tortures practiced by the red men on their captured foes, and on their foes' tender women and helpless children, were such as we read of in no other struggle, hardly even the revolting pages that tell the deeds of the Holy Inquisition.

Nathan Glazer, *American Epic: Then and Now*, PUB. INTEREST, Winter 1998, at 12.

white women for pleasure and burned wagon trains for entertainment—who merited extermination if he refused to settle on the reservation. It was he who would be forever engraved on the American consciousness as symbolizing the uncontrollable, and therefore dangerous, aspects of an uncivilized human nature. It was he who would be endlessly shot, stabbed, hung, starved, dismembered, buried or burned alive, without a tear shed, in those countless popular western melodramas passed off as the “dime novel” American epic of the Winning of the West.<sup>44</sup>

#### 4. *Death*

Mid-nineteenth century federal Indian policy, embodied in a principle of “measured tribal separatism,” assumed the Great Plains tribes—influenced by treaty annuities, education and non-Indian missionaries—would voluntarily adapt to a non-Indian way of life.<sup>45</sup> But soon after the end of the Indian wars in the 1870s and the settlement of those tribes onto reservations, western congressmen and the BIA condemned the separatism policy as being too soft on tribalism. It had only served to encourage the false hope among the tribes that they could somehow continue their hunting and roaming way of life.<sup>46</sup>

What the tribes required, these reformers argued, was the stern hand of a federal guardian who treated them, not as semi-sovereign peoples capable of treaty making, but as what they had

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<sup>44</sup> By the 1880s the bloodthirsty Indian warrior had become a mere stage prop for furnishing the American stage set of the “winning of the west.” It was Buffalo Bill Cody’s “Wild West Shows” of that era that embodied these “dime novel illusions in flesh and blood.” HINE & FARAGHER, *supra* note 21, at 501. Cody shot, killed and scalped a Cheyenne warrior and added the Indian’s scalp to his show for his audience to feel and touch, thus converting melodrama into the flesh of reality. *Id.*

<sup>45</sup> By statute in 1834 Indian Country was defined as:

[A]ll that part of the United States west of the Mississippi, and not within the states of Missouri or Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which Indian title has not been extinguished, for the purpose of this act, [shall be] deemed to be Indian Country.

Regulation of Trade and Intercourse with the Indian Tribes Act, 4 Stat. 729 (1834).

Later, many Great Plains Indian peoples, in exchange for giving up expansive claims to their aboriginal territories, reserved, by treaty, vast hunting and roaming areas for their exclusive use and occupancy. They were assured by the federal government that “as long as [the] rivers run” those lands would be theirs. GETCHES ET AL., *supra* note 11, 140-41.

<sup>46</sup> Bishop Whipple, among other influential friends of the Indian, wanted President Lincoln to treat the Indian peoples as governmental wards, not as members of quasi-sovereign political entities. PRUCHA, *supra* note 6, at 470.

become—dependent governmental wards. The tribe was viewed by these reformers as the major impediment to quickly converting tribal members into farmers, ranchers and wage-laborers. They consciously under-emphasized the side benefit of their proposed Indian allotment program—the release of millions of acres of tribal trust lands to non-Indian settlement.<sup>47</sup>

But many treaties with the Great Plains tribes had guaranteed the territorial integrity of the tribes' reserved lands.<sup>48</sup> Modification of those territorial boundaries required a favorable vote by at least a majority of the adult male members of those tribes.<sup>49</sup> To accomplish their goals, these Indian reformers would have to breach these Indian treaties long deemed to be part of the controlling law of the land under the Supremacy Clause of the United States Constitution. Their attack focused on what they called "the evils of tribalism": communal Indian land tenure; extravagant give-aways by wealthy tribal members to their less fortunate tribesmen; week-long inter-tribal festivals and pow-wows and traditional celebrations of heathen religious practices such as the Sun Dance ceremony. Branding tribalism as anti-American, as well as heathen in nature, they recruited a wide array of supporters to their anti-tribalism crusade: mainstream religious organizations who sought to evangelize the Indians; non-Indian ranchers and farmers who coveted the Indians' prairie and arable land base; land-starved emigrants from Scandinavia and elsewhere who arrived too late to obtain homesteads under the 1862 Homestead Act; and those liberal friends of the Indian who

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<sup>47</sup> The reform-minded Board of Indian Commissioners had come to support the principle of Indian allotment as a means of assimilating and civilizing the Indian peoples. At the famous Lake Mohonk Conference in 1884, the Board endorsed "heartily" the allotment concept. Non-Indian settlers supported allotment because it would eventually release millions of acres of Indian lands as "surplus lands" for non-Indian entry and settlement. PRUCHA, *supra* note 6, at 659-71.

<sup>48</sup> Marshall's Indian law decisions and related federal treaties confirmed the Indian peoples' exclusive use and occupancy rights in vast hunting and roaming reserves in the American West. CORNELL, *supra* note 3, at 45-50.

<sup>49</sup> Article 12 of the 1867 treaty with the Kiowa and Comanche Tribes of Indians provided that:

No treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians occupying the same, and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided by Article III (VI) of this treaty. Treaty of Medicine Lodge Creek, Oct. 21, 1867, art. 12, 15 Stat. 581, 585.



wanted to salvage those Indian people who could successfully adapt to a non-Indian way of life.<sup>50</sup>

The federal government's resulting war on tribalism from the 1880s to the 1930s resymbolized the complex, life-affirming, cultural and social practices of diverse Indian peoples as the major road block to their assimilation into American society.<sup>51</sup> But freeing up Indian lands for non-Indian use, rather than emancipating individual tribal members from the clutches of superstition and communal land holding, was the real goal of the 1880s Indian reform movement.<sup>52</sup>

This goal was to be achieved via the General Indian Allotment Act of 1887.<sup>53</sup> Its provisions envisioned the federal assignment of homestead-sized parcels of agricultural land to each eligible tribal member on reservations throughout Indian Country. Those Indian lands that were deemed surplus to the allotment needs of a particular reservation would be "opened" for settlement and sold to non-Indian homesteaders for about a \$1.25 an acre. The funds obtained from the sale of surplus Indian lands would be deposited to the affected tribe's United States Treasury Account. Those funds could be expended, in the federal government's discretion, for the civilizing and subsistence needs of the affected Indians.<sup>54</sup>

The avowed goal of Indian allotment was the destruction of both tribes and tribalism.<sup>55</sup> The federal government could assert direct control over its newly-created class of Indian allottees only if tribes were effectively removed as governing institutions. However, the Great Plains tribes, like the Kiowa and Comanche, fiercely resisted allotment. Led by Chief Lone Wolf of the Kiowa and Comanche Indians, they challenged in the United States Supreme Court the federal government's power to breach its sovereign agreements guaranteeing the territorial integrity of reserved Indian lands.<sup>56</sup> The Supreme Court rejected Lone Wolf's challenge to Indian allotment and modified federal Indian law so as to accommodate the changed status of the tribes as govern-

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<sup>50</sup> PRUCHA, *supra* note 6, at 659-71.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-358, 381 (1994)).

<sup>54</sup> GETCHES ET AL., *supra* note 11, at 165-75.

<sup>55</sup> *Id.* at 166-67.

<sup>56</sup> Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

mental wards.<sup>57</sup> In its 1903 decision in *Lone Wolf v. Hitchcock*<sup>58</sup>, the Court completed its subordination of the tribe to federal plenary power.<sup>59</sup>

The disastrous empirical consequences of allotment for the Indian peoples are well-known. About 90-100 million acres of Indian lands were lost to tribal ownership, leaving a tribal trust land base of only some 40 million acres to support the surviving Indian peoples.<sup>60</sup> Much of this lost tribal acreage fell into non-Indian ranchers' and farmers' hands or reverted to the states for non-payment, by those "competent" Indian allottees, of local property taxes.<sup>61</sup>

Few commentators have addressed the qualitative effects of allotment on the Indian peoples. I will briefly comment on these issues. First, allotment displaced traditional tribal land uses in favor of intensive, land-degrading ranching and dry-land farming practices by non-Indian settlers and Indian allottees. The health of the remaining Indian range and agricultural land-base quickly deteriorated due to these altered land use patterns.<sup>62</sup> For exam-

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<sup>57</sup> From Justice White's viewpoint, the Indian peoples' right of occupancy was not equivalent to ownership of their lands. The federal government was owner of those lands and could effect a change in the Indians' use of those lands if it was necessary for the Indians' benefit. *Id.*

<sup>58</sup> 187 U.S. 553 (1903). Professor David Getches places Lone Wolf's struggle against forced allotment of the Kiowa-Comanche reservation within the Indian pantheon of resistance actions that resisted the placement of their peoples on "the white man's road." GETCHES ET AL., *supra* note 11, at 190.

<sup>59</sup> Professor Blue Clark places the *Lone Wolf* decision in the larger, international law context when he analyzes Henry Cabot Lodge's reliance upon that decision, among other Indian law decisions, as the basis for the United States' assumption of guardianship over "domestic, dependent nations" during Senate debates over the federal government's assumption of guardianship over the "dark-skinned" peoples of the Philippines. BLUE CLARK, *LONE WOLF V. HITCHCOCK: TREATY RIGHTS AND INDIAN LAW AT THE END OF THE NINETEENTH CENTURY* 102-3 (1994).

<sup>60</sup> GETCHES ET AL., *supra* note 11, at 165-71.

<sup>61</sup> John Collier, Commissioner of Indian Affairs during the 1930s and early 1940s, testified before the Senate Indian Affairs Committee in 1934 regarding the adverse effects of allotment on Indian land use and ownership and said:

Through the allotment system, more than 80 percent of the land value belonging to the Indians in 1887 has been taken away from them; more than 85 percent of the land value of all allotted Indians has been taken away. And the allotment system, working through the partitionment or sale of the land of deceased allottees, mathematically insures and practically requires that the remaining Indian allotted land shall pass to the whites. The allotment act contemplates total landlessness for the Indians of the third generation of each allotted tribe.

GETCHES ET AL., *supra* note 11, at 172.

<sup>62</sup> Commissioner Collier testified before the Senate Indian Affairs Committee in

ple, prior to allotment on the Fort Berthold Indian Reservation in North Dakota, tribal families subsisted largely on produce from their communally-farmed gardens. This gardening represented primarily the labor of tribal women, but some men did assist them.<sup>63</sup> Along with hunting and berry-gathering, this community gardening sustained generations of Indian people on Fort Berthold, as well as on other reservations. Allotment rendered that continued agricultural use impracticable on those reservations. The boosters of allotment predicted that it would stimulate the rise of a hardy, self-reliant, yeoman class of Indian farmers and ranchers. The reality was that Indian allotments on virtually all of the allotted Indian reservations fell into disuse and decay.<sup>64</sup>

Second, allotment encouraged tribal members to shed their tribal identities in favor of American citizenship.<sup>65</sup> By voluntarily accepting an allotment and by successfully completing their transition into successful farmers or ranchers, tribal members could earn American citizenship.<sup>66</sup> By this means the federal government sought to undermine the significance of tribal affiliation.

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1934 that allotment "precluded the integrated use of the land by [Indian] individuals or families, even at the start." *Id.* at 171.

<sup>63</sup> Professor Virginia Peters stresses that "[b]efore the Europeans arrived the village tribes had engaged in a centuries-old pattern of intertribal barter, using corn, raised by the women, as their medium of exchange." VIRGINIA B. PETERS, *WOMEN OF THE EARTH LODGES: TRIBAL LIFE ON THE PLAINS* 143-57 (1995).

<sup>64</sup> *Id.*

<sup>65</sup> Historian Fergus M. Bordewich speaks to federal ceremonies held on various Great Plains reservations in the 1880s designed to impress upon would-be Indian allottees the importance of federal citizenship:

An outdoor ceremony was staged at Timber Lake to impress the allottees with the importance of citizenship. They stood resplendent in the feathers and fringed buckskin of a bygone age, facing Major James McLaughlin, a shrewd and hard man who was known to all Sioux as the Indian agent who had ordered the arrest of Sitting Bull in 1890. Ramrod-stiff, cigar in hand, McLaughlin watched as each Indian solemnly stepped from a tepee and shot an arrow to signify that he was leaving behind his Indian way of life. Moving forward, he then placed his hand on a plow to demonstrate that he had chosen to live the farming life of a white man. He was next handed a purse to remind him to save what he earned. Finally, holding the American flag, the Indian repeated these words: "Forasmuch as the President has said that I am worthy to be a citizen of the United States, I now promise this flag that I will give my hands, my head, and my heart to the doing of all that will make me a true American citizen." It was the culminating, transformative moment of which Dawes had dreamed.

FERGUS M. BORDEWICH, *KILLING THE WHITE MAN'S INDIAN: REINVENTING NATIVE AMERICANS AT THE END OF THE TWENTIETH CENTURY* 122-23 (1996).

<sup>66</sup> *Id.*

However, few Indians valued American citizenship enough to sacrifice their tribal identities in an effort to become successful Indian ranchers and farmers.<sup>67</sup> Those relatively few Indian allottees who did assimilate to a non-Indian way of life were deemed by their tribesmen to be “white Indians.”<sup>68</sup>

Third, allotment encouraged Indian parents to send their children to the newly-created federal Indian boarding schools.<sup>69</sup> An American-type education was deemed to be the most reliable means for assimilating Indian children into a non-Indian society.<sup>70</sup> It was the archetypal means for disabusing those children of their inherited tribal superstitions and beliefs, and it was also the means of separating those children from their parents, clan-uncles and clan-aunts who remained behind in the Indian camps.<sup>71</sup>

Fourth, allotment fundamentally resymbolized the Indian peoples’ relationship to their lands as well as to their fellow tribesmen.<sup>72</sup> By insisting that the Indian must repudiate his tri-

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<sup>67</sup> Historian Bordewich concludes that the allotment process intended to “transform Indians into yeoman farmers” but instead “sapped the vitality of traditional tribal government, and terminated the possibility that Indian societies might be able to evolve at their own pace according to their own standards.” *Id.* at 124.

<sup>68</sup> “Blood fusion” between tribal Indians and non-Indians was a process that allotment accelerated as a means of assimilating the Indian people into American society. *Id.* at 328-29.

<sup>69</sup> Indian education in off-reservation, federally-run, boarding schools was the brain-child in 1879 of Captain Richard Henry Pratt. He considered Indian reservation life as a morally repugnant form of segregation, but nonetheless advocated the physical separation of Indian children from their parents and families so as to promote their assimilation in a non-Indian way of life. He argued that the Indian is “born a blank,” and with neither “ideas of civilization nor savagery.” *Id.* at 282.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> The Mandan and Arikara women’s historic relationship to the land represented an interlacing of sexual, social and economic statuses within their village life along the Missouri River. Professor Virginia Peters powerfully depicts this complicated relationship by writing:

Many young men and a few of the old helped pick the ears of ripe corn as they had during the green corn harvest. For this the women paid them by building fires near their piles of corn on which they placed kettles containing corn and meat. The men and girls were all painted and dressed in their best clothes. The prettiest girls always had the largest group of young men around their piles of corn. As the husking proceeded, any unripe ears were [placed] aside to become the property of the male helpers. They either ate them or fed them to their ponies; the women did not want them because they would rot and spoil the ripe corn if placed in caches.

Although there was much rejoicing and jollity at harvest time, there was a serious undertone. The village women felt a sacred duty to be sure that

bal identity as the means of entering American society, allotment demonstrated the federal government's deep fear and mistrust of tribalism. As a practical matter, the only goal that allotment achieved was that it transferred millions of acres of Indian lands to non-Indians. Colorado's Senator Henry Teller was the lone voice protesting the Indian allotment bill in the Senate, and he predicted that allotment would impoverish the Indian both economically and spiritually. All contemporary commentators agree that allotment did realize that goal.<sup>73</sup>

By creating a deep psychological divide between the Indian peoples and their lands, it created new, antagonistic classes of Indians. Class membership was defined by possession of greater and lesser degrees of tribal blood. Members of these classes allegedly responded differently to the economic and social incentives offered by the allotment program. A new class of Indian cultural brokers arose; Indian men and women who could interpret the allotment directives of the newly empowered BIA to the "blanket Indians"—usually those greater than half-blood tribal members who resisted allotment in particular and civilization in general.<sup>74</sup>

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every ear of corn was gathered and used for some purpose. A missionary told Wilson that an Arikara woman whom she knew dropped every seed with a kind of prayer. The Arikara legend of the "Forgotten Ear" emphasizes the women's love for their gardens and the food they produce. One day an Arikara woman thought she heard a child begging not to be left behind when she started to leave her field. She searched through her whole garden until at last she finally found one small ear of corn which she had overlooked. As soon as she gathered in the corn, the crying stopped.

PETERS, *supra* note 63, at 119-20.

<sup>73</sup> GETCHES ET AL., *supra* note 11, at 171-73.

<sup>74</sup> A brief case study of how allotment created and sustained class divisions among the Indian peoples on the Fort Berthold Indian Reservation, North Dakota, from the late 1880s to the 1990s is provided by Professor Castle McLaughlin. See Castle McLaughlin, *Nation, Tribe, and Class: The Dynamics of Agrarian Transformation on the Fort Berthold Reservation*, 22 AMER. INDIAN CULTURE & RES. J. 101 (1998).

He describes a *relational* model that was "generated over time by the 'structured context' of the [Fort Berthold] reservation[s] political economy and in response to the situated positions and social identities of others." *Id.* at 105.

McLaughlin emphasizes that Indian allotment on Fort Berthold and other Great Plains Indian reservations had as its goal the "dissolution of tribal organization and the assimilation of Indian individuals . . . [via] the adoption of practices and values associated with a capitalist democracy, such as the nuclear family organization, Christianity, the 'Protestant ethic,' and utilitarianism." *Id.* at 106.

He describes the application of the allotment process on Fort Berthold:

As on other reservations, agrarian enterprises—first farming, then live-stock production—were used as a vehicle for promoting individual "civilization" at Fort Berthold. Cattle were first distributed as part of a federal

Allotment also resulted in a deeply disaffected class of Indian men and women. They bought into its personal emancipatory promise that, by obtaining an American-style education, they could bridge the great social distance between their discarded tribal identities and assume a new life as an esteemed American professional such as a lawyer, educator, doctor, or political leader. Many of these individuals became the objects of derision, laughed at openly by Indian and non-Indian alike for their pretentious airs.<sup>75</sup>

By exacerbating political and social tensions within reservation population segments—particularly the animosities between the full-blood and half-blood factions—allotment sought to explode

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payment following an 1886 agreement (ratified in 1891) by which the Fort Berthold people relinquished 228,168 acres of their 1,193,788-acre reservation and agreed to the allotment of the remaining 965,620 acres. Between that year and 1902, the U.S. government spent \$140,000 of tribal funds on livestock, and the number of Indian-owned cattle rose from 400 to 7,000 head. Prior to a 1910 land cession, the sale of beef to the government and to markets such as Chicago accounted for nearly half of the total income on the reservation. While “unearned income” from land sales and leases became the most significant income source after 1910, during the following decade the value of crops raised (\$367,549) and the livestock sold (\$419,984) at Fort Berthold far surpassed income from (primarily per diem) wage labor (\$144,951).

*Id.* at 107.

<sup>75</sup> Allotment and related federal financial-assistance programs directed to foster Indian ranching enterprises on the Fort Berthold Reservation have resulted in class-based conflict between the Indian landowning community and the ranching community. Here is how McLaughlin describes this conflict in the 1980s and 1990s on Fort Berthold:

Class consciousness has developed from both opposing material interests and contrasting ideological and moral frameworks that guide interaction between people and the natural world. Landowners have been led to assign commodity values to their lands and have constructed their identity in part from their inability to control and realize “fair returns” for its use; they have developed a keen sense of their position within the local political economy. Unequal relations of exchange, not production per se, have engendered the construction of these class identities. Ranchers are viewed as having repudiated the signs and practice of reciprocity, which both functions as a material “safety net” and serves as metaphor for the commensal social order: “Half of us are starving, but they’d die before they’d give us a beef.” Age, gender (most [Indian] landowners are tribal elders, and today many are women), internally perceived racial differences (many ranchers are of mixed heritage), and commitment to traditional values are all drawn on for the discursive construction of materially reproduced differences. One young landowner characterized conflict between ranchers, landowners and the tribe as “spiritual warfare” and forecast, “Eventually, the tribe will end up buying all the land, and then Uncle Sam will come and collect.”

*Id.* at 124.

tribalism from within. Traditionalists, those Indians who opposed the BIA and its civilizing programs, were said to represent the full-blood reservation political contingent. They were at odds with the modernists, those Indians who sought to shape the BIA's civilizing programs to their benefit, who were said to represent the half-blood reservation political contingent.

Allotment sought to explode tribalism from the inside by mapping new economic and social incentives onto intra-tribal relations. It encouraged those more astute, better educated Indians to assert their individual interests at the expense of their less well-endowed tribesmen. It sought to recruit the newly created allottees as agents of social change who would transform tribalism from within.<sup>76</sup>

It also introduced exotic agents of social change into tribalism. It encouraged non-Indian farmers and ranchers to undermine traditional tribal land uses by seizing the opportunity to lease Indian lands from the BIA at cut-rate prices. By inter-marrying with tribal women and cooperating with the BIA in managing fractious tribal members, these non-Indians became the most conservative force in opposing future efforts at tribal self-determination.<sup>77</sup> Allotment also created a new class of landless Indians by later allowing disabled or incompetent tribal members to sell or lease their allotments to non-Indians so as to realize a subsistence income.<sup>78</sup> The 1906 Burke Act enlarged this landless In-

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<sup>76</sup> McLaughlin graphically describes the rise of a new "ranching class," born of allotment and related federal policies, on the Fort Berthold Reservation:

[T]he government "patronage system" rewarded this incipient private sector through the provision of unsecured reimbursable loans and by utilizing proceeds from tribal land sales for the establishment of demonstration farms and for the purchase of high-grade livestock. Such practices were frequently protested by older traditional leaders, who regarded such use of tribal funds as inequitable and whose formal influence and ability to redistribute goods were undermined by the emergent agrarian entrepreneurs. Initially, ranchers organized economic labor and galvanized support within indigenous social institutions such as kinship groups, using their skills and relative wealth to become prominent leaders. Under pressure to assimilate and increasingly invested in market exchange, by the 1920s and 1930s agrarian entrepreneurs had begun to disengage partially from such social and moral networks and associated responsibilities. As the child of a successful Fort Berthold rancher recalled, "My father wasn't much of a 'pow-wower'; he regarded dances and give-aways as a waste of time and money."

*Id.* at 107-08.

<sup>77</sup> *Id.*

<sup>78</sup> Some of the successful Indian ranchers on Fort Berthold exploited the Burke Act to avoid BIA regulation of their grazing practices according to McLaughlin.

dian class by issuing so-called “forced fee patents” to those Indians who were deemed by a federal commission competent to manage their own affairs.<sup>79</sup> Ironically, it was the better-educated, half-blood or less tribal members who received these forced fee patents from the federal competency commissions. Once freed of trust status, those lands became taxable and most of those lands were lost to Indian ownership for failure to pay county or state property taxes.<sup>80</sup>

Despite the federal government’s formal repudiation of Indian allotment in 1934, the damage had already been done.<sup>81</sup> Allotment, along with other introduced federal laws designed to disrupt tribalism in the late nineteenth-century such as the Indian Major Crimes Act of 1886,<sup>82</sup> was intended to resymbolize a new Indian ideal: the white man’s Indian.<sup>83</sup> Thus, the very idea of “Indianness” became a contested meaning that embodied the legal and administrative needs of the federal government, rather than the cultural survival requirements of the Indian peoples.<sup>84</sup> By seeking to take jurisdiction not only over the Indians’ lands but over their personal conduct as well, the federal government

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They converted their trust-patent lands to fee-patent status and led the agency superintendent to charge that at least forty “of the more intelligent and thrifty Indians” were avoiding the reservation-wide cattle round-ups and working their stock without agency supervision. *Id.* at 108.

<sup>79</sup> Congress established so-called “competency commissions” to assess whether one-half blood or less Indian allottees were sufficiently assimilated to be required to accept a “forced fee-patent.” See 25 U.S.C. § 349 (2001). Thousands of such patents were issued to Indians, and many lost their allotted lands for non-payment of county or state property taxes. GETCHES ET AL., *supra* note 11, at 174.

<sup>80</sup> *Id.*

<sup>81</sup> Section one of the Indian Reorganization Act states: “No land of any Indian reservation . . . shall be allotted in severalty to any Indian.” 25 U.S.C. § 461 (2001).

<sup>82</sup> 23 Stat. 385 (1885).

<sup>83</sup> Army Captain Richard Henry Pratt, a key architect of federal Indian education in the 1880s, advocated the “killing of the Indian, so as to save the man inside.” DAVID H. DEJONG, *PROMISES OF THE PAST: A HISTORY OF INDIAN EDUCATION IN THE UNITED STATES* 116 (1993).

Mr. Thomas Morgan, Indian Commissioner from 1889 to 1893, was also convinced that compulsory federal schooling would “turn the American Indian into the Indian American.” Clyde Ellis, *‘A Remedy for Barbarism’: Indian Schools, The Civilizing Program and the Kiowa-Comanche-Apache Reservation, 1871-1915*, 18 AMER. INDIAN CULTURE & RES. J. 85 (1994).

<sup>84</sup> Democracy was defined as a “caste system” organized by European conceptions of race in late nineteenth-century America. Those Americans with virtually any degree of African or Asian ancestry were defined by local law as “colored” and subjected to various legal disabilities due to their status. Not surprisingly, the federal government likewise began to “grade” Indian peoples according to their degree of Indian blood. JENNINGS, *supra* note 5, at 309.



sought to end tribalism forever. But allotment did not succeed in destroying tribalism. It merely shifted the focus of the contest from the external world to the internal life-worlds of the Indian peoples. In that forum, any federal policy will always be doomed to defeat.<sup>85</sup>

### 5. *Rebirth*

Killing the tribe proved difficult, despite the federal government's best efforts. The Indian peoples themselves survived the Indian allotment era that stretched from the 1880s to the 1920s. Public revulsion against the allotment era's results spurred federal studies such as the 1928 Merriam Report that found that the Indian peoples were, by far, the most isolated and impoverished American minority.<sup>86</sup> But the rebirth of the tribe is associated with one man: Indian Commissioner John C. Collier.<sup>87</sup> Reviving tribalism was to be achieved through the implementation within Indian Country of the Indian Reorganization Act (IRA) of 1934.<sup>88</sup> The IRA, as viewed by Collier and Interior Secretary Harold Ickes, was a logical extension of proven Progressivist principles of participatory democracy into Indian Country.<sup>89</sup> Collier's opportunity to revive tribalism came on the heels of those twin evils of the early 1930's, the Great Depression and the Dust Bowl in the American midwest. Collier's "Indian New Deal," like President Roosevelt's "American New Deal," generally promised the revitalization of Indian Country through federal economic and technical assistance to the devastated tribal communities.

Collier's social re-engineering of Indian Country sought to resymbolize tribes as constitutional democracies, entitled to a measure of home rule on their respective reservations. By this

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<sup>85</sup> Alexis de Tocqueville concluded in 1848 that "[n]evertheless, the Europeans have not been able to change the character of the Indians entirely." *Id.* at 310.

<sup>86</sup> GETCHES ET AL., *supra* note 11, at 192-94.

<sup>87</sup> John Collier was active from 1916 on in the National Community Center movement. Professor Kevin Mattson argues that the organization "always remained committed to community-based democracy." KEVIN MATTSON, *CREATING A DEMOCRATIC PUBLIC: THE STRUGGLE FOR URBAN PARTICIPATORY DEMOCRACY DURING THE PROGRESSIVE ERA* 67 (1998).

According to Professor Jennings, Collier, later president of the American Indian Defense Association, was "overwhelmed in a mystical way by the rituals of the Pueblo Indians functioning in worship of nature." JENNINGS, *supra* note 5, at 388.

<sup>88</sup> Pub. L. No. 73-383, 48 Stat. 984 (1934).

<sup>89</sup> JENNINGS, *supra* note 5, at 388-89.

device, he hoped to make tribalism's revival palatable to the American public. Collier was convinced newly created tribal institutions—tribal constitutions, tribal business councils and an awakened tribal electorate—would eventually emancipate the Indian peoples from their dependence on the federal government.<sup>90</sup> He had worked to empower other fragmented American minorities—such as the Irish and the Italians in New York, Chicago, Boston and elsewhere—by a strategy of emancipatory politics that organized these groups into political, economic and cultural forces within the larger American society.<sup>91</sup>

However, Collier failed to recognize that, unlike the ethnically new and solid immigrant groups, the Indian peoples had adapted their own strategies to deal with their wardship status under federal administration. Convincing the Indian peoples that tribal home rule was a preferable alternative to BIA control was Collier's biggest challenge in selling the IRA to Indian Country. A tradition of passive Indian resistance to BIA administration had defined a leadership tradition within Indian Country. These home-grown Indian leaders were skeptical of Collier's promise that if they assumed the burdens of tribal decision-making, their decisions would be respected by the federal government.<sup>92</sup>

Collier presumed that many Indians, particularly the more assimilated mixed-bloods, would eagerly embrace the IRA.<sup>93</sup> This view was more than naive. He did not grasp that, as a result of the Indian allotment programs and a lengthy period of BIA-rule, an interlocking set of interests ruled contemporary Indian Country. Those non-Indian farmers and ranchers who leased Indian lands constituted one such interest group. They knew their Indian allottees and the BIA very well. They also knew how to spread disinformation about the effect of the IRA on the allottees' interests and thereby undermine Collier's efforts to sell the IRA within Indian Country. This influential interest group did not support Collier's goal of enhancing tribal decision-making if

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> The IRA's structure of tribal constitutions and elected tribal officials conflicted with the traditions of many, if not most, tribes in which government has been almost wholly hereditary. *Id.* at 388-89.

<sup>93</sup> Collier described this group of Indians as "mixed blood with a white-plus psychology." GRAHAM D. TAYLOR, *THE NEW DEAL AND AMERICAN INDIAN TRIBALISM* 52 (1980). It is true that younger Indian men of mixed-blood ancestry predominated on the new tribal councils. *Id.* at 51.

it threatened their economic interests.<sup>94</sup>

Ironically, many full-blood tribal leaders also distrusted the IRA's system of representative, elected tribal councils governed by written tribal constitutions. They feared that traditional clan-based decision-making would be eclipsed by these over-strong tribal institutions.<sup>95</sup> But Collier's instinctive judgment that his IRA would be supported by the better-educated, assimilated tribal members proved to be true on some of the reservations. They grasped the potential economic and social value of the tribal offices created by the IRA, and they welcomed a voice, however small, in their own affairs.<sup>96</sup>

Collier also underestimated the BIA's resistance to the IRA. Through its "back channel" contacts in Congress, the BIA actively sought to undermine and limit its implementation.<sup>97</sup> Finally, Collier overestimated his personal ability to persuade recalcitrant tribes such as the Navajo and the Crow to accept the IRA.<sup>98</sup> The Navajo sheep herders were outraged by his heavy-handed efforts to reduce their herds within the carrying capacity of their rapidly deteriorating range. The Crow feared that the IRA would undermine their traditional governance based on a general council system.

Assessing the IRA as an overall success or failure is not yet possible. Many IRA tribes are now remaking their constitutions and governments to better fit their evolving needs and their new understandings of themselves as Indian peoples.<sup>99</sup> Tribal home rule, at least as envisioned by Collier, still has not been realized on many Indian reservations. Collier's IRA applied a "lowest common denominator" approach for the political development of indigenous peoples from the Arctic Circle to the American southwest. Stock tribal constitutions were presented to guide the political development of radically divergent Indian societies.<sup>100</sup> Not surprisingly, some critics of the IRA liken Collier to Congressman Dawes: one sought to colonize tribalism with the idea

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<sup>94</sup> Not surprisingly, non-Indian farmers and ranchers that leased Indian allotments resisted their displacement by the tribal land consolidation and cooperative efforts spurred by the IRA. *Id.* at 125.

<sup>95</sup> *Id.* at 39-62.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 149.

<sup>98</sup> *Id.* at 33, 128-29.

<sup>99</sup> JENNINGS, *supra* note 5, at 150.

<sup>100</sup> *Id.* at 39-62.

of individual property rights, while the other sought to colonize it with the idea of constitutional democracy. Neither understood the depth and pervasiveness of Indian resistance to their initiatives for the benefit of the Indian peoples.<sup>101</sup>

Collateral IRA provisions, such as those establishing Indian hiring and promotion preferences within the BIA, have had the most impact.<sup>102</sup> These provisions helped leverage the creation of a new Indian professional class: the Indian bureaucrat. Collier certainly would have applauded the creation of this new class. It notched perfectly into Collier's vision that his IRA would reciprocally transform both the tribes and the federal government.<sup>103</sup> The tribes, as they gained power and experience under the IRA, would demand more and better performance from the BIA. The BIA, as it progressively became more "Indianized," would respond more sensitively to the tribes' demand for an enlarged decision-making role.<sup>104</sup> This hope likewise remains to be fully realized within Indian Country.

# I

## THE FAILED EFFORT TO EMANCIPATE THE AMERICAN INDIAN PEOPLES

Federal Indian law has just emerged from its most recent dark age—the 1950s and early 1960s—when tribes were required to bear burdens, not exercise sovereign powers.<sup>105</sup> During that era

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<sup>101</sup> *Id.*

<sup>102</sup> *Morton v. Mancari*, 417 U.S. 535 (1974). Professor David Williams has become somewhat exercised over what he views as the potential hypocrisy of the *Mancari* decision's "tying [employment] benefits to this kind of racial calibration [of one-fourth or more Indian blood that] has historically been associated with racism at its most despicable . . . ." *GETCHES ET AL.*, *supra* note 45, at 243.

<sup>103</sup> Taylor, *supra* note 92, at 39-62.

<sup>104</sup> *Id.*

<sup>105</sup> Professor Getches dates this "dark age" of Indian law from 1945 to 1961. He describes this era as follows:

A turnaround in congressional policy toward Indians resulted in the dramatic departure from the reforms spearheaded by John Collier that began in the early 1940s. There were calls from Capitol Hill to repeal the IRA and to move away from the encouragement of tribal self-government as official federal policy. Collier, Commissioner of the BIA since 1933, resigned in 1945. . . . In 1949, the Hoover Commission issued its Report on Indian Affairs, recommending an about-face in federal policy: "complete integration" of the Indians should be the goal so that Indians would move "into the population as full, taxpaying citizens."

*GETCHES ET AL.*, *supra* note 11, at 204.

many tribes were terminated by federal action,<sup>106</sup> some were subjected to state jurisdiction under Public Law 280,<sup>107</sup> and still others had their members relocated to urban areas such as Denver, Chicago and the California Bay Area.<sup>108</sup> Since that time tribes have sought to ride the crest of larger, potentially emancipating movements such as the American civil rights revolution of the 1960s and a series of pro-tribal judicial decisions in the 1970s to a new era of tribal self-determination.<sup>109</sup>

### A. *The Origin of Tribal Self-Determination*

Self-determination was introduced into the Indian Country lexicon by President Richard Nixon's 1970 Indian Message to Congress.<sup>110</sup> He modified the phrase "self-determination," however, by adding tribal as an adjective. Nixon clearly sought a new foundation for federal Indian law and policy.<sup>111</sup> That phrase has been extended to include several sub-areas of tribal endeavor: tribal environmental self-determination;<sup>112</sup> tribal cultural self-de-

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<sup>106</sup> Termination of tribal status was, for Senator Arthur V. Watkins who led the pro-termination forces in 1953 in Congress, the means of "end[ing] the status of Indians as wards of the government and grant[ing] them all the rights and prerogatives pertaining to American citizenship." *Id.* at 204-5.

<sup>107</sup> This federal jurisdictional transfer statute, enacted in 1953, sought to grant the United States' criminal and civil jurisdictional responsibilities within Indian Country to the states. Professor Carole Goldberg-Ambrose, the leading scholar on Public Law 280, charitably characterized this statute's intent as a "compromise between wholly abandoning the Indians to the states and maintaining them as federally protected wards, subject to only federal or tribal jurisdiction." *Id.* at 488. *See also* Pub. L. No. 280 (codified at 18 U.S.C. § 1162 and 28 U.S.C. § 1360).

<sup>108</sup> The BIA recognized the "economic carrying capacity" of the Indian reservations would not provide suitable job opportunities for many young Indian men and women, especially those trained in vocational and clerical skills at off-reservation boarding schools. The BIA developed the relocation program in the 1950s and 1960s as a means to get these Indian people to the supposed job opportunities within America's urban centers. GETCHES ET AL., *supra* note 11, at 204-24.

<sup>109</sup> Professor Getches credits the Supreme Court of the late 1960s and 1970s with becoming the "defender of Indian rights," and it was required to "decide the extent to which residual legislation from an earlier era of policy should be enforced and the degree to which contemporary policy should inform interpretation and application of law." *Id.* at 233-34.

<sup>110</sup> President Nixon's major goal in promoting tribal self-determination was "to strengthen the Indian's sense of autonomy without threatening his sense of community." *Id.* at 227.

<sup>111</sup> *Id.* at 226-28.

<sup>112</sup> *See* Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination*, 21 VT. L. REV. 225 (1996).

termination;<sup>113</sup> and tribal economic self-determination.<sup>114</sup> This new phraseology suggests that a fundamental paradigm shift in federal Indian law has occurred.

But beyond relatively bland assertions, legal commentators have offered remarkably little insight into the basic character, process and purpose of tribal self-determination. What is needed is a critique that renders tribal self-determination comprehensible, useful and, most importantly, adaptable to the needs of the American Indian people. Thirty years have passed since the formal initiation of the tribal self-determination era, so we must now step back and take stock of the tribal progress made under its banner. To do so, we must examine both the self-determination and tribal components of Nixon's famous phrase.

### 1. *Evaluating the Self-Determination Component*

Self-determination arguably encapsulates a distinct people's inherent right to self-governing status. This right ostensibly derives from the contemporary interpretation of emerging international, human rights and indigenous peoples' law.<sup>115</sup> Read together, they hold that those core attributes of a culture—language, religious beliefs and practices, as well as the distinctive socio-economic arrangements—deserve respect under domestic and international law.<sup>116</sup> Indeed, modern European history, beginning in the sixteenth century, if not earlier, is largely a recounting of the struggles of distinct peoples to achieve self-determining status.<sup>117</sup> This struggle continues today as indigenous peoples the world over assert their inherent and human right to self-determination.<sup>118</sup>

But a distinct people's inherent rights may be denied to them. These rights may be held in "trust" for them by a more powerful, colonizing nation.<sup>119</sup> Such was the experience of many of the in-

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<sup>113</sup> See Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145 (1996).

<sup>114</sup> See Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251 (1995).

<sup>115</sup> Professor James Anaya argues that "human beings, individually and as groups, should be in control of their own destiny and that structures of government should be devised accordingly." S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 ARIZ. J. INT'L & COMP. L. 1 (1991).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> George W. Shepard, Jr., *The Power System and Basic Human Rights: From*

indigenous peoples of sub-Saharan Africa and Southeast Asia during the late nineteenth and early twentieth centuries.<sup>120</sup> The European trusteeship over those indigenous peoples was described by Rudyard Kipling as the "white man's burden."<sup>121</sup> Later, worn down by the burdens of colonial administration and bankrupted by the horrendous costs of World War II, most of these European colonial nations during the 1950s and 1960s acceded to the demands of these indigenous peoples and restored their self-determining status.<sup>122</sup>

Should President Nixon's 1970 Indian Message be read as restoring self-determining status to the Indian peoples? That depends on how one reads the "tribal" adjective that modifies self-determination. That modifier renders ambiguous the nature, scope and purpose of tribal self-determination.

## 2. *Evaluating the 'Tribal' Component*

I seek to measure the contemporary tribe's potential for realizing self-determination against the background constraints of federal Indian law. I do so by focusing on the three most prominent tribal strategies for realizing self-determination. First, tribes have sought to "morph" their inherent and reserved treaty rights into tribal police powers throughout Indian Country.<sup>123</sup> Second, tribes have sought both economic control over their lands and to use their competitive advantages so as to rebuild their tribal economies.<sup>124</sup> Third, tribes have sought to reassert their cultural identities as distinct peoples by securing constitutionally and stat-

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*Tribute to Self-Reliance in HUMAN RIGHTS AND THIRD WORLD DEVELOPMENT* 13-25 (George W. Shepard & Ved P. Nanda eds., 1985).

<sup>120</sup> Kipling spoke of the Indian as "half savage and half child"—the former requiring civilization and the latter socialization. ASHIS NANDY, *TRADITIONS, TYRANNY AND UTOPIAS: ESSAYS IN POLITICAL AWARENESS* 58 (1987).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Tribes have naturally sought in the contemporary era, in Professor Getches' view, to "increase the reach and sophistication of their own governmental powers over Indian Country." GETCHES ET AL., *supra* note 11, at 556. But their efforts to achieve reservation development and self-sufficiency has brought them into direct conflict with the "states [who] continually seek to assert their jurisdictional power over Indian Country." *Id.* at 556.

This tribal versus state battle over "which government entity gets to receive a stream of tax revenues or apply its land use ordinance on the reservation" will hinge "on the jurisdictional principles of federal Indian law in an effort to resolve these intense, high-stakes cross-cultural conflicts." *Id.* at 556-57.

<sup>124</sup> Stephen Cornell advocates for tribes to assert "de facto sovereignty" as their means of achieving economic development within Indian Country. *Id.* at 721 (citing

utorily protected rights to the free exercise of their religious and social practices.<sup>125</sup>

I analyze these tribal strategies for self-determination within two alternative contexts. First, I critique these strategies against the backdrop of what I call the standard development model for Indian Country. I conclude that this model holds promise only for that minority of tribes who view wealth creation and accumulation as the essential feature of their quest for self-determination. Second, I critique these strategies against the backdrop of what I call the transcendent model of tribal self-determination. I conclude that this approach likely holds greater promise for the majority of tribes who view cultural and social revitalization as the essential feature of their quest for self-determination.

### *B. My Critique of the Standard Model of Tribal Self-Determination*

Tribal efforts to transform their inherent and treaty-reserved powers into practical means for the realization of their self-determination goals occasioned most of the Indian litigation of the past thirty years.<sup>126</sup> The working thesis that informs this tribal

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Stephen Cornell, *Sovereignty, Prosperity and Policy in Indian Country Today*, 5 COMMUNITY REINVESTMENT 5, 5-13 (1997)).

His recommendation stems from a Harvard study of the marketplace performance of over seventy-five tribes with significant forest-based resources. This study's results lead Cornell to conclude that sovereignty is the primary development resource a tribe possesses. But this sovereignty must be guided by institutional structures that ensure the separation of politics from business, an effective professional tribal bureaucracy and the constitutional separation of tribal governmental powers. *Id.* at 723-25.

<sup>125</sup> In 1921, the Commissioner of Indian Affairs recommended the continuing suppression of traditional American Indian religious and cultural practices:

The sun-dance, and all other similar dances and so-called religious ceremonies are considered "Indian offences" under existing regulations, and corrective penalties are provided. I regard such restriction as applicable to any dance . . . which involves the reckless giving away of property . . . frequent or prolonged periods of any celebration . . . in fact any disorderly or plainly excessive performance that promotes superstitious cruelty, licentiousness, idleness, danger to health, and shiftless indifference to family welfare.

GETCHES ET AL., *supra* note 11, at 754 (citing FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 175 (1992)).

Contemporary Indian religious practitioners have invoked the Free Exercise Clause of the First Amendment as a means of preserving their cultural and ceremonial access to sacred sites on the public lands. See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

<sup>126</sup> See GETCHES ET AL., *supra* note 11, at 556-620.



strategy conceives of contemporary tribes as legitimate American governments, akin to non-Indian local and state governments. Therefore, denying a tribe the right to exercise a particular governmental power must be justified by citation to a specific treaty or statutory provision expressly limiting that tribe's governmental authority.<sup>127</sup> By this approach, tribes have sought to persuade the federal courts, the executive branch and Congress to set a place for them at the table of American governance.

The tribes' efforts to transform themselves into fully-recognized American governments have bumped up against the juridical limits inherent in Chief Justice Marshall's concept of the tribe.<sup>128</sup> Tribes naturally have asserted their inherent and treaty-reserved powers as constitutive of their identity as legitimate American governments. They contend these powers must be judicially reinterpreted in a manner that allows the Indian people to cope with their radically altered environments, economies, welfare needs and social goals.<sup>129</sup> They also contend the ancient and more recent organic documents—Marshall's Indian law decisions, treaties, agreements, executive orders and tribal constitutions or codes—serve as enabling legislation empowering tribal governments to enact those "necessary and proper" ordinances that will allow the Indian people to adapt to their substantially changed circumstances.<sup>130</sup>

However, the Supreme Court of the United States has recently responded in blunt terms to this tribal strategy for self-determination. Put simply, the Court now regards tribal governments as constitutively different from, if not inferior to, state and local governments.<sup>131</sup> It is likely that tribes will not be allowed to exercise their governmental powers in a manner that competes with, or ostensibly threatens, the constitutionally established rights and powers of those governments or their citizens.<sup>132</sup>

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<sup>127</sup> *Id.*

<sup>128</sup> Marshall's concept of the tribe as a "domestic, dependent nation" has been exploited by the modern Supreme Court to limit the governmental powers of Indian peoples within Indian Country. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

<sup>129</sup> *GETCHES ET AL.*, *supra* note 11, at 531-55.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> The Seminole Tribe's suit against Florida to enforce the good faith negotiation provisions of the Indian Gaming Regulatory Act (IGRA) was dismissed on state sovereign immunity grounds. *See Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (5-4

# 1. *The Limits of the Standard Model of Tribal Self-Determination*

Tribal efforts to “cash-in” their inherent and treaty-reserved powers into the currency of recognized police powers within Indian Country have driven recent Indian litigation. The limits of this approach to tribal self-determination are illustrated in these following analytic sections.

## a. *Limiting Tribal Regulatory and Adjudicatory Authority Within Indian Country*

The resymbolizing of tribes as sovereign authorities within Indian Country has attracted much attention from the courts, Congress, and state and local governments. The tribes’ assertion of a wide-range of police powers deemed essential to the realization of their sovereign interests has generated a substantial non-Indian backlash.<sup>133</sup>

Tribal self-determination demands, from the tribes’ viewpoint, judicial endorsement of those tribally reserved police powers essential for the growth and maturation of self-sustaining American Indian societies.<sup>134</sup> Tribes, from the late 1960s to the late 1970s, were somewhat successful in persuading the federal courts to reinterpret their inherent and reserved sovereign powers so as to meet their radically altered economic, environmental and cultural circumstances. An impressive string of pro-tribal judicial decisions during this era commemorated the apparent success of this strategy.<sup>135</sup> However, the Supreme Court’s recent string of

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decision) (Stevens, J., dissenting). This decision has crippled tribal efforts to develop gaming enterprises that require a negotiated tribal-state compact as a basis for commencing operations. Some constitutional scholars, such as Professor Martha Field, mistakenly minimize the significance of this decision for tribal economic development:

*Seminole* is probably not of major significance in regard to federal-Indian-state relations. It is designed to be, and is, a major decision about the meaning of the Eleventh Amendment and about federal-state relations, judicial and congressional. The decision obviously affect the IGRA. But the scheme that replaces the one held unconstitutional in *Seminole* could prove more advantageous to Native Americans rather than less.

GETCHES ET AL., *supra* note 11, at 751 (citing Martha A. Field, *The Seminole Case, Federalism, and the Indian Common Cause*, 29 ARIZ. ST. L.J. 3, 3-4 (1997)). Whatever “more advantageous scheme” Professor Field had in mind for Indian gaming has yet to materialize.

<sup>133</sup> GETCHES ET AL., *supra* note 11, at 531-55.

<sup>134</sup> *Id.* at 556-620.

<sup>135</sup> *Id.*

anti-tribal decisions had revived Chief Justice Marshall's view of tribes as historically-determined entities severely limited in the nature and scope of their reserved police powers within Indian Country.<sup>136</sup>

*b. The Supreme Court's Response to the Tribes' Assertion of Sweeping Police Powers Within Indian Country*

Justice Rehnquist's opinion in *Oliphant v. Suquamish Tribe*<sup>137</sup> revived Marshall's juridical concept of the tribe as a historically-determined American government whose inherent powers were substantially altered upon its incorporation into the United States. He revived Marshall's incorporation thesis by holding that Indian tribes had been, early on in America's history, divested of any inherent criminal jurisdiction they may have once possessed over non-Indian defendants.<sup>138</sup>

A brief analysis of the facts and holdings of that decision will demonstrate the substantial limit imposed by the Court on the tribe's assertion of general police powers within Indian Country. Suquamish tribal police arrested Mark David Oliphant, a non-member, during the tribe's annual Chief Seattle Days celebration, and charged him with assaulting a tribal officer and resisting arrest. They also arrested another non-member, David Belgarde, after a high-speed chase along the reservation highways that ended when Belgarde collided with a tribal police vehicle. He was later charged at arraignment with reckless endangerment and damaging tribal property.<sup>139</sup>

The Port Madison Reservation, wherein the Suquamish people reside, is located across the Puget Sound from Seattle. It is a checkerboard of tribal trust land, allotted Indian land, property held in fee simple by non-Indians, and various roads and public highways maintained by Kitsap County.<sup>140</sup> Both the federal district court and the Ninth Circuit Court of Appeals upheld tribal criminal jurisdiction over these two non-member defendants. The U.S. Supreme Court granted certiorari to determine whether

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<sup>136</sup> Tribal efforts to assert criminal and civil jurisdiction over non-Indians within Indian country prompted the Supreme Court to substantially limit the circumstances under which these asserted tribal police powers may be exercised. *Id.* at 531-55.

<sup>137</sup> 435 U.S. 191 (1978).

<sup>138</sup> *Id.* at 208-11.

<sup>139</sup> *Id.* at 194.

<sup>140</sup> *Id.* at 192-93.

tribal courts have criminal jurisdiction over non-members in these circumstances.

Rehnquist reasoned, as did Chief Justice Marshall earlier, that Indian reservations are “part of the territory of the United States” and that they “hold and occupy [the reservations] with the assent of the United States,” and concluded that “by submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.”<sup>141</sup>

He likewise turned legal history on its head, citing dictum in a famous pro-tribal Supreme Court<sup>142</sup> decision that immunized tribal Indians from federal criminal jurisdiction, by arguing to allow Indian tribes to criminally prosecute non-Indian defendants would:

[I]mpose upon [non-Indian defendants] the restraints of an external and unknown code . . . , which judges them by a standard made by others and not for them . . . [i]t tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception.<sup>143</sup>

His sketchy historical research regarding tribal criminal jurisdiction was calculated to create what he described as a uniform judicial and congressional understanding that tribes had been divested of any inherent criminal jurisdiction over non-Indian defendants who may violate their laws.<sup>144</sup> Tribes forever remain, for Rehnquist, the wolf-child, treacherous and vengeful, seeking to inflict cruelty on any non-Indian who may fall into their grasp.<sup>145</sup> Allowing tribes to exercise criminal jurisdiction over non-Indians who violate their laws would return America to the unregulated tribal world, one lacking in reliable laws or procedures for the protection of the individual liberties of non-Indians.<sup>146</sup>

Given that the *Oliphant* decision dealt with the unique issues

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<sup>141</sup> *Id.* at 208-10 (quoting *United States v. Rogers*, 45 U.S. (4 How.) 567, 571-72 (1846)).

<sup>142</sup> *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883).

<sup>143</sup> *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 210-11 (quoting *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883)).

<sup>144</sup> *Id.* at 193.

<sup>145</sup> *Id.* at 195.

<sup>146</sup> *Id.* at 196.

of individual liberty and lacked citation to reliable precedent, most legal commentators thought that its effect was limited to the criminal jurisdiction arena.<sup>147</sup> They were soon proven wrong. Within a few years, the Supreme Court demonstrated the virtually unbridled reach of the *Oliphant* rationale by substantially limiting tribal civil regulatory jurisdiction over non-Indians within Indian Country.<sup>148</sup> A brief analysis of the facts and holdings of that decision illustrates the substantial limit imposed on the tribes' assertion of general regulatory powers within Indian Country.

The Supreme Court's 1981 decision in *Montana v. United States* focused on the Crow tribe's effort to regulate duck hunting and trout fishing by non-Indians on fee-owned lands within the boundaries of the Crow Reservation.<sup>149</sup> The lower court had upheld tribal regulatory power as an incident of the inherent sovereignty of the Crow people.<sup>150</sup> However, Justice Stewart rejected that position by citing the *Oliphant* decision for the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe."<sup>151</sup>

The *Montana* decision vitiates, but does not necessarily eliminate, tribal police power over non-Indians who reside within Indian Country. It does require a tribe to demonstrate, as the basis for tribal regulation of non-Indian activity on non-trust lands, that such activity "directly and substantially" burdens a tribally-protected interest.<sup>152</sup> Hidden behind the lines of the *Montana* decision is President Washington's view of the Indian peoples as innately vengeful "wolf-children," given at any moment to unpredictable and irrational action. Limited by the *Montana* and *Oliphant* decisions, tribes can never mature into American governments worthy of being entrusted with general regulatory or adjudicatory jurisdiction within their territories.<sup>153</sup>

Tribes, after these two Supreme Court decisions, have understandably sought different strategies for self-determination

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<sup>147</sup> GETCHES ET AL., *supra* note 11, at 542-43.

<sup>148</sup> *Montana v. United States*, 450 U.S. 544 (1981).

<sup>149</sup> *Id.* at 547.

<sup>150</sup> *Id.* at 550.

<sup>151</sup> *Id.* at 565.

<sup>152</sup> *Id.* at 548.

<sup>153</sup> Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 273-74.

within Indian Country. Some have embraced a tribal strategy of administrative self-determination within Indian Country. Building internal administrative capabilities within tribal governments and preferentially employing tribal members in relatively sophisticated and remunerative jobs is a practical extension of John Collier's earlier idea of Indian home-rule within Indian Country. But it took President Nixon's "jaw-boning" of Congress to finally bring this vision to reality via the 1975 enactment of the Indian Self-Determination Act (ISDA).

### C. *Building Tribal Administrative Capabilities Within Indian Country*

The congressional response to President Nixon's 1970 Indian Message was to enact the ISDA.<sup>154</sup> It authorized the tribes to contract with the Secretary of the Interior for the direct tribal administration of those federally-funded Indian benefit programs presently run by the Bureau of Indian Affairs (BIA) or the Indian Health Service (IHS).<sup>155</sup> As a result, the ISDA was significantly amended in 1988 and 1994 and is now popularly known as the Tribal Self-Governance Act (TSGA).<sup>156</sup> Tribes, now by con-

<sup>154</sup> 25 U.S.C. § 450(a)-(n) (2001).

<sup>155</sup> GETCHES ET AL., *supra* note 11, at 226-230.

<sup>156</sup> Tadd Johnson describes the congressional intent motivating the 1988 amendments to the ISDA:

The new Title featured a planning grant phase for twenty tribes. The twenty tribes were then to negotiate compacts with the Secretary of the Interior. The tribes were allowed to "plan, conduct, consolidate, and administer programs, services, and functions" of the Interior Department that were "otherwise available to Indian tribes or Indians." Under the terms of the written agreements, tribes were authorized to "redesign programs, activities, functions or services and reallocate funds of such programs, activities or services." The agreement was to specify the services to be provided under the agreement and the procedures to be used to reallocate funds. In essence, the Self-Governance Demonstration Project allowed twenty Indian tribes to receive funds in a large block grant from the Secretary of the Interior. It allowed the Demonstration tribes to move money among programs as well as the power to actually prioritize spending, as opposed to the shadow prioritizing process that characterized the IPS. In general, Self-Governance gave tribes the power to make choices and be responsible for their choices.

Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251, 1267-68 (1995).

He describes the 1994 amendments to the ISDA as "incremental self-governance" that, "[w]hile 'grandfathering' all of the Demonstration tribes . . . provides for participation of only twenty new tribes each year." *Id.* at 1270.

He describes the major changes wrought by the 1994 amendments as including annually negotiated "funding agreements" between the Interior Department and the

tract or compact, can stand in the shoes of the BIA and IHS, or other Interior Department agencies, so as to administer on their respective reservations most of the federally-funded Indian benefit programs.<sup>157</sup>

The ISDA's seeming assumption is that by baby-steps, tribes can move towards self-determination. It carries out this assumption by providing financial incentives to those tribes that are willing to departmentalize and professionalize their staffs and administrative structures. Tribal self-determination, by this reckoning, will grow out of an increasingly sophisticated, rationalized tribal bureaucracy.<sup>158</sup> Some tribes have taken this development path by opting to virtually take over the BIA's and IHS's programs on their reservations. This approach has quickly yielded visible evidence of tribal self-determination, according to its advocates, by the increased employment of tribal members, through tribal preferences for hiring and promoting tribal members into tribal administrative and staff positions.

Furthermore, these ISDA advocates argue that by empowering tribes to design and develop their own reservation programs, better quality goods and services will be delivered to the Indian peoples. Moreover, individual tribal members will be spurred to educationally and professionally invest in their talents and gain the required degrees or skills certifications that will enable them to take advantage of these enlarged tribal employment opportunities.<sup>159</sup>

But the ISDA, despite its admittedly positive influences in incrementally adding tribal jobs and administrative capabilities, cannot serve as an adequate approach to tribal self-determination. The reason is threefold. First, tribal self-determination fails

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Self-Governance tribes that contemplate that "all [DOI] programs are eligible for tribal administration under the funding agreement . . ." *Id.* at 1270-71. Tribes thus have the opportunity to assume control of "non-BIA activities on or near their reservations." *Id.* at 1272.

<sup>157</sup> *Id.*

<sup>158</sup> Some legal commentators see the Indian Self-Determination Act of 1975 as initiating a process of "tribalization." He describes it as follows:

"Tribalization," as coined herein, refers to the process by which resources dedicated to administering and implementing Indian programs are removed from the Bureau of Indian Affairs personnel and placed directly in the hands of tribal governments. The tribal governments then have authority to perform tasks formerly reserved for the Federal trustee.

*Id.* at 1252.

<sup>159</sup> *Id.*

to define a core set of legal attributes that places tribes on par with other recognized American governments.<sup>160</sup> The ISDA, by this reckoning, contributes almost nothing to the growth of tribes as self-determining entities. Instead, the ISDA expressly limits tribes to administering narrowly defined statutory functions. These statutory limitations require the tribes to deliver the same, or similar, bundles of goods and services as the IHS or BIA would have provided to eligible Indian beneficiaries.<sup>161</sup>

Second, this new relationship between ostensibly self-determining tribes and federal government has produced troubling evidence of federal intrusion into internal tribal decision-making.<sup>162</sup> Some western congressmen, such as former Senator Slade Gorton, have sought to punish those tribes who exercise their treaty reserved rights by refusing them their self-determination funding.<sup>163</sup> Viewed in this light, the ISDA serves to potentially constrain, rather than promote, tribal self-determination. Most tribes do have a fairly realistic view of the ISDA's promise and process. They do not view it as the royal road to self-determination. They do view it as an instrument to promote tribal employment and development within Indian Country.<sup>164</sup>

Tribal administrative development cannot be meaningfully equated with tribal self-determination. For this reason, tribes have understandably sought out other subject matter areas for the meaningful expression of their peoples' power and identity. Tribes have successfully built on the largely anecdotal evidence of their wise stewardship of their lands and resources as the basis for asserting exclusive jurisdiction over environmental resources within Indian Country. Surprising allies have rallied in support of their efforts, including President Reagan in 1983 and the Environmental Protection Agency (EPA) in 1984. Will the tribe enjoy success in building an ethic of tribal environmental self-determination?

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> Professor Getches cites efforts by some western congressmen to legislatively curtail tribes' inherent and treaty-reserved powers as evidence of a non-Indian backlash against tribes' self-determination efforts. GETCHES ET AL., *supra* note 11, at 152.

<sup>163</sup> *Id.* at 739-42.

<sup>164</sup> Johnson, *supra* note 113, at 1278-79.



### *D. Tribes as States Under Federal Environmental Statutes*

Resymbolizing "tribes as states" (TAS) is the new and highly-touted approach to enhancing tribal authority over environmental resources located within Indian Country.<sup>165</sup> It was another Republican President, Ronald Reagan, who spurred the development of this approach. It was his 1983 Indian Policy Statement—directing all federal executive agencies, not just the Interior Department, to develop government-to-government relationships with those tribes within their respective jurisdictions—that effectively launched the TAS era.<sup>166</sup> Two tribal self-determination strategies derived from President Reagan's directive merit assessment.

#### *1. The Administrative Origin of the TAS Strategy*

Some executive agencies responded more fulsomely than others to President Reagan's 1983 Indian Policy Statement. The EPA promulgated its 1984 Indian Environmental Policy (IEP) as a means of redefining its relationship with tribes throughout the United States.<sup>167</sup> Administrator William Riley's 1991 restatement of the IEP policy clearly addresses tribal environmental self-determination:

The Agency will, in making decisions on program authoriza-

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<sup>165</sup> Congress amended several federal environmental statutes to enable the EPA to treat tribes as states for the purposes of administering the following program functions: (1) Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-26 (1988) (the EPA may treat tribes for all programs contained in statute); (2) Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675 (Supp. IV 1992) (the EPA may enter into cooperative agreements with tribes to carry out the Superfund's purposes); (3) Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988) (the EPA may treat tribes as for most regulatory purposes); and, (4) Clean Air Act, 42 U.S.C. §§ 7401-7671g (1990) (the EPA may treat tribes as states for the purposes of the Act).

The Clean Water Act's TAS amendment enables tribes to assume regulatory control over reservation water sources for specific program purposes. *See* 33 U.S.C. § 1377(e) (1988). They may qualify for grants for pollution control programs or construction of treatment facilities. They may also act to establish water quality standards and assume the implementation of a permit system to enforce those standards. But the Act requires the applicant tribal government to possess a governing body that carries out substantial governmental duties and powers, and limits any tribe's assumed functions to the management of water resources "within the borders of an Indian reservation" owned by, or held in trust for, a tribe or individual Indian. *See* John L. Williams, *The Effect of EPA's Designation of Tribes as States on the Five Civilized Tribes in Oklahoma*, 29 TULSA L.J. 345, 347-51 (1993).

<sup>166</sup> *Id.* at 346.

<sup>167</sup> *Id.*

tion and other matters where jurisdiction over reservation pollution sources is critical, apply federal law as found in the U.S. Constitution, applicable treaties and statutes and federal Indian law. Consistent with the EPA Indian Policy and the interest of administrative clarity, the Agency will view Indian reservations as single administrative units for regulatory purposes. Hence as a general rule, the agency will authorize a tribe or state government to manage reservation programs only where that government can demonstrate adequate jurisdiction over pollution sources throughout the reservation. Where, however, a tribe cannot demonstrate jurisdiction over one or more of the reservation sources, the Agency will retain enforcement primary for those resources. Until EPA formally authorizes a state or tribal program, the Agency retains full responsibility for program management. Where the EPA retains such responsibility, it will carry out its duties in accordance with the principles set forth in the EPA Indian policy.<sup>168</sup>

This pragmatically-based EPA policy thus favors tribal environmental self-determination for sound administrative and regulatory reasons. While it does contemplate the eventual tribal administration of most, if not eventually all, reservation-based environmental programs, it does so to promote the overriding federal environmental interests embodied in the governing environmental laws. While the EPA's Indian policy does promote a tribal voice in determining the future environmental character of their tribal homelands, it does so as a strategy to achieve the overarching goals of federal environmental law.<sup>169</sup>

Congress statutorily ratified and extended EPA's Indian policy via its enactment in 1987 of several TAS amendments to the major environmental statutes. Indian tribes, like states, are to work cooperatively with the EPA to accomplish the federally-established environmental goals.<sup>170</sup> The TAS amendments authorized

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<sup>168</sup> *Id.*; see *Federal, Tribal and State Roles in the Protection of the Reservation Environment*, A Concept Paper Accompanying A Memorandum from Mr. William Reilly, Administrator, EPA (July 10, 1991).

<sup>169</sup> The Tenth Circuit Court of Appeals used this rationale to uphold an Indian pueblo's ceremonial use designation of Rio Grande waters as against an Establishment Clause challenge by the city of Albuquerque. The court concluded the "EPA's purpose in approving the designated use is unrelated to the Isleta Pueblo's religious reason for establishing it" and that such a designation "serves a clear secular purpose: promotion of the goals of the Clean Water Act." *City of Albuquerque v. Browner*, 97 F.3d 415, 428 (10th Cir. 1996).

<sup>170</sup> The EPA's statement is explicit in this regard:

The Agency will, in making decisions on program authorization and other matters where jurisdiction over reservation pollution sources is critical, apply federal law as found in the U.S. Constitution, applicable treaties, statutes and federal Indian law. Consistent with the EPA Indian Policy and the

the EPA to promote—through the provision of grant assistance and technical support—the tribal governments’ development of their administrative capabilities to regulate reservation-based environmental resources.<sup>171</sup>

2. *EPA’s Adoption of the “Direct and Substantial” Effect Test As the Regulatory Basis for Awarding TAS Status*

Given the tribes’ role in carrying out federal environmental policy within Indian Country, the EPA’s recent interpretive rule implementing section 518(e) of the Clean Water Act (CWA) appears all the more puzzling.<sup>172</sup> It fundamentally undermines the TAS approach to tribal environmental self-determination. It does so by expressly incorporating the “second prong” of the *Montana* test into the basis for tribal regulation of non-Indian activities that affect the reservation’s waters. The EPA characterized that decision as allowing the tribe to regulate non-member conduct on fee lands within the reservation only if that conduct has a direct effect on tribal health and welfare.<sup>173</sup>

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interests of administrative clarity, the agency will view Indian reservations as single administrative units for regulatory purposes. Hence as a general rule, the agency will authorize a tribal or state government to manage reservation programs only where that government can demonstrate adequate jurisdiction over pollution sources throughout the reservation. Where, however, a tribe cannot demonstrate jurisdiction over one or more reservation sources, the agency will retain enforcement primacy for those sources. Until EPA formally authorizes a state or tribal program, the agency retains full responsibility for program management. Where EPA retains such responsibility, it will carry out its duties in accordance with the principles set forth in the EPA Indian policy.

Raymond Cross, *When Brendale Met Chevron: The Role of the Federal Courts in the Construction of an Indian Environmental Law*, 1 GREAT PLAINS NAT. RESOURCES J. 1, 11 (1996) (on file with author).

<sup>171</sup> Williams, *supra* note 165, at 346-47.

<sup>172</sup> The EPA’s interpretive rule permits a tribal applicant to demonstrate that it has jurisdiction over non-members’ activities on fee lands by showing that their activities on those lands may imperil the tribe’s political integrity, economic security, or health and welfare in a serious and substantial manner. The EPA’s rule further presumes that tribal applicants will generally be able to meet this standard. 40 C.F.R. §§ 131.1-8 (2001) [hereinafter “EPA Rule”].

<sup>173</sup> The EPA’s interpretive rule inexplicably ignores the provision in section 518(e) that points out that the purpose of TAS status is to protect those “water resources held by an Indian tribe . . . [or] . . . held by the United States in trust for Indians.” The statutorily recognized trust status of these water resources should effectively preclude the EPA’s adoption of its “territorial analysis” that focuses on the scope of inherent tribal jurisdiction over non-Indians on fee status lands within Indian Country. This federal trust duty to protect Indian waters from injury is, of course, an independent obligation of the EPA and does not depend on the nature

The EPA likewise incorporated the Supreme Court's 1989 holding in *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*<sup>174</sup> into its interpretive rule. That decision was read by the EPA as holding that only the "direct and substantial" impact of a non-member's activities on a protected tribal interest will justify the tribal regulation of those activities on fee lands within the reservation. Despite its characterization of the Court's opinion in *Brendale* as "deeply splintered" and expressing no clear rule for determining the scope of inherent tribal jurisdiction over non-members' activities, the EPA nonetheless incorporated its holding into its interpretive rule.

A brief recounting of the factual structure underlying the Court's deeply splintered holding in *Brendale* demonstrates why the EPA was mistaken in its action. The Yakima Indian Reservation is located in the southeastern part of the state of Washington. Of the 1.3 million acres of reservation land, approximately 80% is held in federal trust status on behalf of the Yakima Nation or individual tribal members. The remaining 20% is owned in fee by Indian or non-Indian landowners. Most of the fee land is located in Toppenish, Wapato and Harrah, three incorporated towns located in the northeastern part of the reservation.<sup>175</sup>

The parties and the lower courts regarded the reservation as divided into "opened" and "closed" portions. The closed or "Indian" area of the reservation consists of the western two-thirds of the reservation and is predominantly forest land. The overwhelming majority of the 740,000 acres of land in that area is held in tribal trust. The open area of the reservation is primarily rangeland, agricultural land, and residential and commercial land. Almost half of the land in the open area is held in fee status.<sup>176</sup>

The Yakima Nation adopted its zoning ordinance in 1970 and amended it to its present form in 1972. It applies to all lands within the Yakima Indian Reservation including fee lands owned by Indians or non-Indians. Yakima County adopted a compre-

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and scope of inherent tribal jurisdiction over non-Indians within Indian County. This statutory provision recognizing the trust status of these reservation waters is nowhere addressed in the EPA's rule making. *Id.*

<sup>174</sup> 492 U.S. 408 (1989) (holding that Yakima Nation has zoning authority as to lands owned by nonmembers of tribe in Yakima reservation's "closed area," but not as such lands in reservations "open area").

<sup>175</sup> *Id.* at 415.

<sup>176</sup> *Id.* at 416.

hensive zoning ordinance in 1972. That county ordinance applies to all real property within the county boundaries, except for Indian trust lands. It established a number of use districts which generally govern agricultural, residential, commercial, industrial, and forest watershed uses. The particular zoning designations at issue in this case are the forest watershed and general rural designations.

A non-tribal member, Philip Brendale, owned a 160-acre parcel of land near the center of the closed area of the reservation. It is zoned as a "reservation restricted" area by the Yakima Nation and as "forest watershed" by Yakima County. Brendale submitted a subdivision proposal to Yakima County requesting that he be allowed to divide his 20-acre parcel into ten 2-acre summer cabin sites. However, the proposed subdivision was not allowable under the Yakima Nation ordinance.<sup>177</sup>

Another non-tribal member, Stanley Wilkinson, owned a 40-acre parcel of land in the open area of the reservation, on a slope overlooking the county airport, less than a mile from the northern boundary of the reservation. The land is zoned as agricultural by the Yakima Nation and as general rural by Yakima County. In 1983 Wilkinson applied to the county for permission to subdivide 32 acres of his land into twenty lots for single family homes. The Yakima Nation ordinance would not have allowed this proposed subdivision.<sup>178</sup>

The Yakima Nation challenged both of these proposed developments in federal district court. It sought a declaratory judgment that the Yakima Nation had exclusive authority to zone the properties in question and an injunction barring county approval of any proposed developments inconsistent with the Yakima Nation's zoning ordinance.<sup>179</sup>

A deeply divided Court upheld the Yakima Nation's power to zone the Brendale's property while denying it the power to zone the Wilkinson's property. The "swing opinion" of Justices Stevens and O'Connor distinguished between the "closed" and "opened" areas of the reservation. The two justices reasoned that the undeniably "Indian" character of the closed portion of the reservation authorized the Yakima Nation to "prevent the few individuals who own portions of the closed area in fee from

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<sup>177</sup> *Id.* at 418.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 419.

undermining its general plan to preserve the character of this unique resource . . . .”<sup>180</sup> By the same token, they reasoned that the Yakima Nation lacked the authority to regulate land use within the open portion of the reservation. According to Stevens and O’Connor, non-Indian use of the opened lands had “produced an integrated community that is not economically or culturally delimited by reservation boundaries.”<sup>181</sup> This factor, coupled with the tribe’s lack of power to exclude non-members from that area, caused the two justices to hold that the Yakima Nation “lacks the power to define the essential character of the territory.”<sup>182</sup>

Their swing opinion in *Brendale* has been criticized as establishing an undefinable and potentially racist test for when a portion of an Indian reservation has lost its “Indian character” and is therefore beyond tribal regulatory control.<sup>183</sup> Nonetheless, the EPA seized on the *Brendale* decision as modifying its rule-making powers under section 518(e) of the CWA. It extracted from that decision the “substantial effect” test that it interpolated into its final interpretive rule governing the administrative grant of TAS status to applicant tribes.

Why the EPA chose to incorporate these fundamentally flawed anti-tribal holdings as the basis for its TAS administration, I have criticized elsewhere.<sup>184</sup> By its interpretive rule, a tribe that seeks reservation-wide water quality jurisdiction must now meet an administrative version of the “direct and substantial” effect test.

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<sup>180</sup> *Id.* at 441 (Stevens, J., concurring).

<sup>181</sup> *Id.* at 444.

<sup>182</sup> *Id.* at 444-45.

<sup>183</sup> Professor Joseph Singer has criticized the *Brendale* decision as establishing Indians as a disadvantaged “racial caste”:

The Supreme Court has assumed in recent years that although non-Indians have the right to be free from political control by Indian nations, American Indians can and should be subject to the political sovereignty of non-Indians.

This [disparity] is not the result of neutral rules being applied in a manner that has a disparate impact. Rather, it is the result of *formally unequal* rules. Moreover, it can be explained only by reference to perhaps unconscious racist assumptions about the nature and distribution of both property and power. This fact implies an uncomfortable truth: both property rights and political power in the United States are associated with a system of racial caste.

Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 4-5 (1991).

<sup>184</sup> Raymond Cross, *When Brendale Met Chevron: The Role of the Federal Courts in the Construction of an Indian Environmental Law*, 1 GREAT PLAINS NAT. RES. J. 1 (1996).

Non-Indian fee land owners, joined by state and local governments, have challenged the EPA's TAS designations under this interpretive rule as arbitrary and legally invalid under the Court's *Montana* and *Brendale* decisions.<sup>185</sup>

The recent decision by the Ninth Circuit, albeit upholding the EPA's TAS designation for the Confederated Salish and Kootenai Tribes, illustrates the undermining of tribal authority to protect their reservation waters, as well as the EPA's expertise in ensuring the wise administration of the environmental policies embodied in the CWA.<sup>186</sup> While upholding the challenged TAS designation, the Ninth Circuit denied any *Chevron* deference to the EPA's interpretative rule upon which the TAS designation was based.<sup>187</sup> The court agreed with the appellant, the State of Montana, on this point:

We agree with appellants insofar as they contend that the scope of inherent tribal authority is a question of law for which EPA is entitled to no deference. EPA's decision to adopt inherent tribal authority as the standard intended by Congress may well be viewed in a deferential light because the statute's language and legislative history were not entirely clear. [Citations omitted]. EPA's delineation of the scope of that standard, however, has nothing to do with its own expertise or with any need to fill interstitial gaps in the statute committed to its regulation. Therefore, EPA's delineation of the scope of tribal inherent authority is not entitled to deference.<sup>188</sup>

Future federal district court judges may therefore engage in *de novo* judicial review of the alleged adverse effects on non-Indian governmental or economic interests occasioned by the EPA's future TAS designations. Given that on many of the Great Plains' Indian reservations, non-Indian settlement and economic development has rendered the resident Indians a dispossessed minority within their own homelands, those judges will be sorely tempted to disagree with the wisdom of the EPA's TAS designations. By giving the "direct and substantial" effect test of *Montana* and *Brendale* undue currency within the environmental

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<sup>185</sup> See *Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998).

<sup>186</sup> The State of Montana opposed the EPA's granting of TAS status to the Confederated Salish and Kootenai Tribes of the Flathead Reservation to the extent that such status would extend to reservation land and surface waters owned in fee by non-members of the tribes. The EPA approved the tribe's application after determining that the tribes possessed inherent authority over non-members on fee lands. Montana then sued the EPA over this allegedly illegal agency action. *Id.* at 1140.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

arena, the EPA has rendered the TAS strategy of problematic value to those many Indian people who reside in a deeply subordinated economic and land-owning status on their own reservations.<sup>189</sup>

The promise of the TAS strategy as a means for tribal environmental self-determination has been unduly compromised by the EPA's interpretation of section 518(e) of the CWA. It is not surprising that many tribes have looked beyond the environmental realm in their search for meaningful opportunities for tribal self-determination. It is also not surprising that some tribes have focused on the tribal cultural self-determination arena as the most appropriate forum for expression of their peoples' identities and interests. Can tribes realize cultural self-determination and build an ethic of cultural heritage that will be respected and enforced by the federal courts?

#### *E. Tribal Efforts to Build an Ethic of Cultural Heritage*

Tribal cultural self-determination is the most recent forum of conflict between Indians and non-Indians for control of new statutorily-denominated cultural resources called "cultural patrimony"<sup>190</sup> and "traditional cultural properties."<sup>191</sup> The new conflicts range from competition over non-Indian recreational and Indian cultural uses of public lands to a ferocious battle for control of ancient human remains between non-Indian scientists

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<sup>189</sup> Cross, *supra* note 184.

<sup>190</sup> Professor Dean Suagee characterizes cultural patrimony as "refer[ring] to objects which have such cultural importance that they are considered the inalienable property of a tribe or group, not subject to ownership or alienation by individual members of the tribe or group." Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145, 204 (1996); *see also* Native American Graves Protection and Repatriation Act (NAGPRA), Pub. L. No. 101-601, 104 Stat. 3048 (codified at 25 U.S.C. § 3001(3)(D) (2001)).

<sup>191</sup> "In carrying out [its] responsibilities under [section 106], a Federal Agency shall consult with any Indian tribe or Native Hawaiian organization that attaches cultural or religious significance to" a property that is listed on or eligible for the National Register. National Historic Preservation Act of 1996 § 106(d)(6), 16 U.S.C. § 470(d)(6) (2001). Professor Suagee points to the 1996 proposed rules requiring a federal agency to consult with the relevant tribe or Native Hawaiian organization in the identification of historic properties, assessment of adverse effects and resolution of adverse effects, and, in the event of a failure to resolve adverse effects, the tribe or Native Hawaiian organization would have the same opportunities as the State Historic Preservation Officer (SHPO) to participate in the process through which the Advisory Council would provide comments to the agency. *See* Suagee, *supra* note 190, at 185.



and culturally affiliated tribes.<sup>192</sup>

These new cultural preservation concepts represent a remarkable departure from past historic preservation efforts that were largely directed at protecting American Indian cultural resources because of their utility to non-Indian scientific and aesthetically-interested communities.<sup>193</sup> None of these earlier preservation laws provided for tribal participation in the identification, planning or administration of federal programs or projects that have significant impact on American Indian cultural resources.<sup>194</sup>

Only recently have public land managers come to grips with their obligations to work and consult with affected American Indian communities in carrying out project-related activities affecting American Indian historic and cultural resources. Tribal governments and Indian user groups had historically been marginalized in agency-sponsored projects or planning activities affecting their historic or cultural resources.

1. *The Impact of the Bear Lodge Multiple Use Ass'n v. Babbitt*<sup>195</sup> *Decision on American Indian Cultural Resources Law*

Recent litigation has focused on a federal land manager's implementation of her newly imposed statutory preservation duty to preserve the living cultures of contemporary American Indian communities.<sup>196</sup> In February 1995, the National Park Service issued its Final Climbing Management Plan (FCMP) for Devils Tower in response to the tremendous increase in the rate of rec-

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<sup>192</sup> *Bonnichsen v. United States*, Dep't of Army, 969 F. Supp. 628 (D. Or. 1997).

<sup>193</sup> Raymond Cross & Elizabeth Brenneman, *Devils Tower At The Crossroads: The National Park Service and the Preservation of Native American Cultural Resources in the 21st Century*, 18 PUB. LAND & RESOURCES L. REV. 5, 11-14 (1997).

<sup>194</sup> *Id.* at 17.

<sup>195</sup> 2 F. Supp. 2d 1448 (D. Wyo. 1998). Judge William Downes granted an injunction against the National Park Service forcing it to issue commercial climbing permits.

<sup>196</sup> Devils Tower was determined eligible for the National Register of Historic Places as a traditional cultural property for its American Indian relationships. A traditional cultural property is protected "because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history and (b) are important in maintaining the continuing cultural identity of the community." Cross & Brenneman, *supra* note 193, at 9. The Superintendent of Devils Tower took action to list Devils Tower in compliance with Congress' mandate to preserve Native American cultural use of Devils Tower as a "historical, architectural or [site of] cultural significance at the community, state or local level." *Id.* at 17 n.47 (alteration in original).

reational rock climbing and the corresponding need to protect the site's resources from degradation. The FCMP included the following provisions: no new bolts or fixed pitons will be allowed on the tower; access trails are to be rehabilitated; camouflaged climbing equipment will be required; and certain routes will be closed seasonally to protect raptor nesting. It also discontinued the award of commercial climbing licenses for the month of June and encouraged recreational climbers to refrain from climbing during June due to the cultural importance of this month to the northern plains Indian tribes. No restrictions were imposed on the general visiting public, who may continue to use the site even during the month of June. Only commercial climbers that hold revocable licenses granted by the Superintendent were mandatorily restricted during the month of June under the FCMP.<sup>197</sup> Superintendent Deborah Liggett was the moving force behind the FCMP, and not surprisingly, her action provoked legal challenge,<sup>198</sup> disrupting the climbing management plan for Devils Tower one year into its operation.

This litigation, brought by several commercial and private rock climbing interests, challenged the FCMP as a constitutionally barred governmental establishment of religion in favor of American Indian religious users of Devils Tower. My analysis focuses on the district court proceedings in which the court found for the plaintiffs and granted an injunction against the implementation of the June closure provision of the FCMP.<sup>199</sup> The plaintiffs claimed that the June commercial climbing closure constituted a "subsidy of the Indian religion" and "an excessive governmental entanglement with religion" in violation of the Establishment Clause. Judge Downes agreed with the climbers in granting their requested injunction, ruling that the prohibition of commercial climbing during June violated the Establishment Clause. Superintendent Liggett's expressed intention to close Devils Tower to all rock climbing, private and commercial, if voluntary private compliance with the FCMP failed to significantly reduce non-commercial climbing, in Judge Downes' opinion, amounted to

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<sup>197</sup> *Id.* at 26.

<sup>198</sup> "Superintendent Liggett's action was taken in compliance with Congress' mandate to preserve American Indian cultural use of Devils Tower as a 'historic, architectural or [site of] cultural significance at the community, state or local level.'" *Id.* at 17 n.47 (alteration in original).

<sup>199</sup> *Bear Lodge Multiple Use Ass'n v. Babbitt* (D. Wyo. Jun. 1996) (order granting, in part, Plaintiffs' motion for a preliminary injunction), at 11 (on file with author).

government coercion of individual conduct in favor of American Indian religious activities.<sup>200</sup>

Because I have criticized elsewhere Judge Downes' reasoning in this matter,<sup>201</sup> I focus here on the impact of his decision on the power of federal land managers to reasonably accommodate American Indians' cultural uses of public lands. By characterizing the American Indians' cultural uses of Devils Tower as religious in character, and by distorting the religious accommodation principle expressed in *Lyng v. Northwest Indian Cemetery Protection Ass'n*,<sup>202</sup> Judge Downes construed the June closure of Devils Tower to commercial rock climbing as a violation of the Establishment Clause. By equating all American Indian cultural activities as religiously motivated conduct, he effectively abolished land managers' authority to carry out their cultural preservation duties expressed in statutes such as the National Historic Preservation Act (NHPA).<sup>203</sup>

## 2. *Tribal Cultural Self-Determination After the Bear Lodge Decision*

Coupling Judge Downes' *Bear Lodge* decision, conflating all American Indian cultural practices into religiously motivated be-

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<sup>200</sup> The National Park Service revised its climbing management plan and excised its ban on commercial climbing before trial was held before Judge Downes. Given that excision of the ban on commercial climbing, Judge Downes dismissed the climbers' lawsuit challenging the new "voluntary climbing ban" as coercive and an unconstitutional endorsement of Indian religious beliefs and practices. See *Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F. Supp. 2d 1448 (D. Wyo. 1998).

In a sad denouement of this matter, the Tenth Circuit Court of Appeals upheld the Park Service's reliance on the climbers self-regulation, a new educational program to motivate climbers to comply, and a sign that requests visitors to stay on the trail around the Tower. See *Bear Lodge Multiple Use Ass'n v. Babbitt*, 173 F.3d 814, 819 (10th Cir. 1999).

<sup>201</sup> See Cross & Brenneman, *supra* note 193, at 25-26.

<sup>202</sup> 485 U.S. 439 (1988). Scott Hardt argues that the *Lyng* decision discriminates against Indian religious practitioners:

By focusing on the form of impact the challenged government action creates, rather than the impairment of religious exercise, the Court has drawn a line that discriminates against American Indian religious practitioners. As a result of the free exercise analysis developed by the Supreme Court, persons practicing Western religious traditions are protected from even relatively minor burdens on their religious practices, while American Indians are not protected from government action that essentially destroy religious traditions.

Scott Hardt, *The Sacred Public Lands: Improper Line Drawing in the Supreme Court's Free Exercise Analysis*, 60 U. COLO. L. REV. 601, 657 (1989).

<sup>203</sup> See Cross & Brenneman, *supra* note 193, at 33-39.

liefs, with the *Lyng* Court's reduction of the religious accommodation command of the Free Exercise Clause to mere advisory guidance, leaves federal land managers with very little incentive or authority to preserve American Indians' cultural access to their sacred resources and sites on public lands.<sup>204</sup>

But "baby steps" toward cultural self-determination may be possible within the interstices of governing federal laws. For example, the 1992 "Indian" amendments to the National Historic Preservation Act (NHPA) require federal land management activities affecting "traditional cultural properties" to be "carried out in consultation with the affected tribes."<sup>205</sup> Federal courts have held that these procedural protections of American Indian cultural resources must be scrupulously observed by federal land managers.<sup>206</sup> No doubt the lives of public land managers are complicated by these new procedural duties, but faithful adherence to the tribal consultation requirements provides the Indian peoples with an opportunity to influence federal project activities that impact access to their traditional sacred sites. Only now are federal land managers coming to grips with their obligations to consult and work with affected American Indian communities in preserving traditional cultural properties.<sup>207</sup>

Consultation with affected tribes likewise drives the cultural preservation goals of the Native American Graves Protection and Repatriation Act (NAGPRA)<sup>208</sup>. Federal museums must now inventory their American Indian collections and notify affected tribes of any human remains or artifacts derived from an

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<sup>204</sup> *Id.* at 33-36.

<sup>205</sup> *Id.* at 18-19.

<sup>206</sup> Stern and Slade describe the NHPA, as not an "action forcing" statute, but as imposing procedural duties on the National Park Service (NPS) and similarly situated federal agencies to promote the preservation of identified cultural and historic resources. They conclude that the federal courts have interpreted these duties as mandatory in nature. See Walter E. Stern & Lynn H. Slade, *Effects of Historic and Cultural Resources and Indian Religious Freedom on Public Lands Development: A Practical Primer*, 35 NAT. RESOURCES J. 133, 139-40 (1995).

<sup>207</sup> Public land management agencies, particularly the National Park Service and U.S. Forest Service, are seeking to develop genuine working relationships with affected Native American communities to identify and protect traditional cultural properties. For example, Superintendent Liggett created a Devils Tower working group that included affected Native American communities, representatives of the recreational climbing community, local government, and economic interests. Her actions represent one public land manager's effort to comply with the broadened consultation requirement of the NHPA. See Cross & Brenneman, *supra* note 193, at 18.

<sup>208</sup> Pub. L. No. 101-601, 104 Stat. 3048 (codified at 25 U.S.C. §§ 3001-3013 (1994)).

affiliated tribal culture. Affected tribes may request their return for appropriate tribal administration. Likewise, NAGPRA provides for the repatriation of "discovered" American Indian remains and associated artifacts found on federal lands to the closest culturally affiliated tribe.<sup>209</sup>

While these new federal cultural preservation duties do contribute to tribal cultural self-determination, they do not forcefully establish an ethic of cultural heritage which will authoritatively resolve disputes between non-Indian and tribal interests in cultural resources.<sup>210</sup> Understandably, some tribes have looked beyond the realm of tribal cultural self-determination in an effort to locate entrepreneurial opportunities for the meaningful expression of their peoples' talents and resources. Can these entrepreneurial tribes lead their Indian peoples to the promised land of economic self-determination?

#### F. Tribes As Entrepreneurs

Fundamental to the economic sovereignty of any self-determining people is the exclusive ability to capture those economic rents that derive from business transactions within its territory. The tribes' power to capture these economic rents has been recently confirmed by the Supreme Court's 1982 decision in *Merion v. Jicarilla Apache Tribe*.<sup>211</sup>

A brief recounting of the facts and holdings of that decision displays its potential support for the tribe as entrepreneur. The Jicarilla Apache Tribe imposed a severance tax on "any oil and natural gas severed, saved and removed from Tribal lands."<sup>212</sup> Non-Indian mineral lessees challenged the tribe's authority to impose such a tax on their leasehold interests. The Jicarilla tribe resides on a 742,315 acre executive order reservation in northwest New Mexico. That reservation was established for the tribe's exclusive use and occupancy. The tribe leased about 89%

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<sup>209</sup> Professor Suagee characterizes NAGPRA as "establish[ing] a legal regime to protect human remains and other cultural items located on tribal lands and federal lands." Suagee, *supra* note 190, at 203.

<sup>210</sup> A forceful ethic of cultural heritage would "view cultural heritage as an issue of cultural, ethnic, or in some cases minority rights, and as one of the keys to cultural preservation and self-determination." Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 AZ. ST. L.J. 291, 301 (1999). By that view, "the disposition of cultural heritage should be determined exclusively by the source nations or culturally affiliated groups." *Id.*

<sup>211</sup> 455 U.S. 130 (1982).

<sup>212</sup> *Id.* at 136.

of their reservation for mineral development purposes. Since 1953 various non-Indian mineral lessees have leased, with federal approval, those tribal lands.

In exchange for a cash bonus, royalties, and rents, the typical lease grants the lessee “the exclusive right and privilege to drill for, mine, extract, remove and dispose of all oil and natural gas deposits in or under” the leased land for as long as the minerals are produced in paying quantities.<sup>213</sup>

In 1968, the Jicarilla tribe revised its tribal constitution to provide that “[t]he tribal council may enact ordinances to govern the development of tribal lands and other resources.”<sup>214</sup> The council later enacted an ordinance imposing a severance tax on oil and gas production on tribal land. That ordinance was approved by the BIA in December 1976.

The non-Indian mineral lessees argued that their leaseholds entitled them to enter the reservation and exempted them from further tribal regulation. Justice Thurgood Marshall, writing for the Court’s majority, criticized that argument as failing to accord an appropriate sovereign role to the Jicarilla tribe. Tribal governments, like other sovereigns, must unequivocally waive their taxing authority within the governing leases or contracts, and Justice Marshall found nothing in the challenged tribal mineral leases that demonstrated the Jicarilla tribe’s intent to waive its sovereign taxing authority. He concluded that the Jicarilla Tribe had clearly retained its right to impose a severance tax on the mineral leaseholds in question.<sup>215</sup>

Capturing a share of those economic rents that derive from reservation-based business activities, according to Justice Thurgood Marshall, is simply an incident of a tribe’s inherent sovereign authority recognized by the Court in its 1832 decision in *Worcester v. Georgia*.<sup>216</sup> Chief Justice John Marshall had reasoned in his opinion in *Worcester* that the Cherokee peoples’ right of exclusive use and occupancy of their reserved lands left no room for Georgia’s exercise of regulatory authority within their territory. Justice Thurgood Marshall’s opinion in *Merrion* likewise sought to create a “growth space” for tribal economic development by confirming tribal taxing authority over non-In-

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<sup>213</sup> *Id.* at 135.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 149-52.

<sup>216</sup> 31 U.S. 515 (1832).

dian economic activity within Indian Country. Absent the power to exclusively capture reservation-generated economic rents, tribes that seek to follow the traditional economic development path are likely doomed to failure.<sup>217</sup>

But the Supreme Court's 1980 decision in *Washington v. Confederated Tribes of Colville Indian Reservation*<sup>218</sup> has seemingly destroyed the tribe's right to capture a fair share of those economic rents that derive from economic activity within Indian Country. Instead of adhering to its *Worcester* doctrine barring state intrusion into tribal economic life, Justice White's opinion developed a preemption-based analysis that allows a state to tax away virtually all reservation-generated economic rents unless the affected tribe can demonstrate that those rents derive from a tribally produced value.<sup>219</sup> He conceded that the Colville tribe had an interest in generating revenues for essential government activities; nonetheless he required that the "revenues [be] derived from value generated on the reservation involving the Tribes . . . [and that] the taxpayer [be] the recipient of tribal services."<sup>220</sup>

No doubt the Court's majority was influenced by the fact that the tribal economic rents at stake derived largely from tribal sales of untaxed cigarettes to non-Indians who likely traveled to

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<sup>217</sup> Professor Stephen Cornell considers the tribal exercise of *de facto* sovereignty within Indian Country as essential to the economic development of the Indian peoples:

In virtually every case that we have seen of sustained economic development on American Indian reservations, the primary economic decisions are being made by the tribe, not by outsiders. In every case, the tribe is in the driver's seat. In every case, the role of the Bureau of Indian Affairs (BIA) and other outsider agencies has shifted from decision-maker to resource, from the controlling influence in decisions to advisor or provider of technical assistance.

The logic of this is clear. As long as the BIA or some other outside organization carries primary responsibility for economic conditions on Indian reservations, development decisions will reflect the goals of those organizations, not the goals of the tribe. Furthermore, when outsiders make bad decisions, they don't pay the price, the tribe does.

GETCHES ET AL., *supra* note 11, at 721-22 (citing Stephen Cornell, *Sovereignty, Prospering and Policy in Indian Country Today*, 5 COMMUNITY REINVESTMENT 5, 5-7, 9-13 (1997)).

<sup>218</sup> 447 U.S. 134 (1980) (holding valid the enforcement of Washington taxes as to sales of cigarettes to non-Indian on reservation in state, but imposition on Indian-owned vehicles held invalid).

<sup>219</sup> *Id.* at 156-57.

<sup>220</sup> *Id.*

the Colville reservation to take advantage of those bargain prices.<sup>221</sup> But, as recognized by the dissent, empowering the state and tribe to both tax reservation-based economic activity not only flies in the face of *Worcester*, but also renders problematic the future success of tribal entrepreneurial activity that involves substantial “cross-border” non-Indian involvement or financial participation.<sup>222</sup>

The dissent’s remarks have proven prophetic. Only one recent appeals court decision has disallowed state taxation of reservation-generated value because of its direct impact on tribal economic development opportunities.<sup>223</sup> In *Crow Tribe v. Montana*<sup>224</sup> an Indian tribe challenged Montana’s application of its 30% coal severance tax to non-Indian leaseholders of tribal minerals. In 1972 the tribe leased to Westmoreland Resources the right to mine tribally-reserved coal under the so-called ceded strip of tribal land. In 1975 Montana imposed two taxes on all coal producers. The first was a state severance tax “imposed on each ton of coal produced in the state.”<sup>225</sup> The rate varied from 3% to 30% of the coal’s value, depending on the quality and whether the mining was on the surface or underground. The second tax was a gross proceeds tax imposed on each person engaged in coal mining. The rate was determined by applying the relevant county’s property tax to the assessed value of the coal producer’s gross yield from coal contract sales. The amount taxed varied by county and year.<sup>226</sup>

Between 1975 and 1982, Westmoreland paid \$53,800,000 in

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<sup>221</sup> *Id.* at 155.

<sup>222</sup> The dissent cites three reasons why Indian economic development will be undermined by this decision:

First, it means that in this case the sharp drop in cigarette sales that would result from imposition of state tax will reduce revenues not only of individual Indian retailers, but also of the Tribes themselves as governmental units. Second, it means that a decision permitting application of the state tax would place Indian goods at an actual competitive *disadvantage* as compared to non-Indian ones because the former would have to bear two tax burdens while the latter bore but one. And third, it leads to an actual conflict of jurisdiction and sovereignty because imposition of the Washington tax would inject state law into an on-reservation transaction which the Indians have chosen to subject to their own laws.

*Id.* at 170 (Brennan, J., dissenting).

<sup>223</sup> *Crow Tribe v. Montana*, 819 F.2d 895 (9th Cir. 1987), *aff’d*, 484 U.S. 997 (1988).

<sup>224</sup> 819 F.2d at 895.

<sup>225</sup> *Id.* at 897.

<sup>226</sup> *Id.*



state severance taxes and \$8,100,000 in state gross proceeds taxes for its ceded strip mining operations. In 1976 the tribe imposed its own severance tax of 25% for coal mined on the reservation. In 1982 it enacted a similar tax for coal mined on the ceded strip. The Department of Interior rejected the latter tax because the tribal constitution had disclaimed tribal jurisdiction over the ceded area. That same year Westmoreland agreed to pay the tribal tax but received credit for the coal taxes paid to Montana. Hence it has paid no severance tax to the tribe.

Montana relied on the *Colville* decision as warrant for its taxation of non-Indian tribal mineral lessees, arguing that the Crow tribe, as in the earlier case, sought to “market an exemption from state taxation to persons who would normally do their business elsewhere.”<sup>227</sup> The Ninth Circuit disagreed, concluding the “coal is the Tribe’s property, a natural resource. Its lease brings revenue that represents value generated by tribal activities . . . .”<sup>228</sup>

However, it was the appeals court’s analysis of the Crow tribe’s economic impact study of the state taxes’ effect on the reservation’s coal-based economy that raised troubling analytical issues. That report concluded that the state taxes prevented Crow coal from competing with lower-taxed Wyoming coal and resulted in far less Crow coal production than would otherwise have occurred. The court, over Montana’s vehement objections, concluded that the state taxes had “at least some negative impact on the coal’s marketability.”<sup>229</sup> Further, even assuming Montana has a legitimate interest in taxing Crow coal, the court concluded that these “high taxes affect tribal revenues [and] . . . burden[s] the Tribe’s interests in coal . . . .”<sup>230</sup> The court also cited the “federal policy of promoting tribal self-sufficiency and economic development” as the basis for its preemption holding that Montana’s tax was so large that it could not be applied to tribal leases without interfering with tribal economic development.<sup>231</sup>

Thus, only when the state proves too greedy in its taxing efforts or the affected reservation resource is sufficiently disconnected from the surrounding non-Indian economy<sup>232</sup> will the

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<sup>227</sup> *Id.* at 899.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 900.

<sup>230</sup> *Id.* at 903.

<sup>231</sup> *Id.* at 898 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 140, 149 (1980)).

<sup>232</sup> A unanimous Court emphasized the isolation of this reservation-based hunting

state's capture of reservation-generated economic rents be disallowed. Despite these recent decisions, some legal commentators insist that engagement by entrepreneurial tribes with the larger American marketplace will prove the economic salvation of the Indian peoples. They point to the gaming revenues generated by American Indian casinos that now total over \$8 billion annually as the product of this successful engagement.<sup>233</sup> They further argue that these gaming tribes can arguably leverage an additional \$8 billion in indirect economic benefits to Indian Country by preferentially contracting with and employing Indian contractors and workers.<sup>234</sup>

But neither the gaming, nor the entrepreneurial tribe will likely lead the way to the promised land of tribal economic self-determination. The 1988 enactment of the Indian Gaming Regulatory Act (IGRA) authorizes states to effectively dictate the terms of gaming compacts to the affected tribes and to undermine the utility of gaming for tribal economic development.<sup>235</sup> Some gaming tribes, it is true, have become fabulously wealthy.<sup>236</sup> But their critics contend that their success cannot be realistically duplicated elsewhere in Indian Country. Relatively few tribes enjoy those favorable locations near wealthy population centers that are key to the development of lucrative tribal

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and fishing resource marketed to non-Indian customers as leaving no place for state regulation:

The State has failed to "identify any regulatory function or service . . . that would justify" the assertion of concurrent regulatory authority. The hunting and fishing permitted by the Tribe occur entirely on the reservation. The fish and wildlife resources are either native to the reservation or were created by the joint efforts of the Tribe and the Federal Government. New Mexico does not contribute in any significant respect to the maintenance of these resources, and can point to no other "governmental functions it provides" . . . in connection with hunting and fishing on the reservation by non-members that would justify the assertion of its authority.

*New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 341-42 (1983).

<sup>233</sup> Kenneth E. Robbins, *Casino Buying Power: Catalyst for Economic Development*, 16 AM. INDIAN REP. 20 (2000).

<sup>234</sup> *Id.*

<sup>235</sup> Judge William C. Canby, joined by three other Ninth Circuit judges, dissented from the circuit's denial of a rehearing en banc of the *Rumsey* decision. See *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1253 (9th Cir. 1995), cert. denied, *Sycuan Band of Mission Indians v. Wilson*, 521 U.S. 1118 (1997) ("But under *Rumsey* . . . [t]he State thus has no incentive to negotiate, and there is no system [due to the *Seminole* decision] to require negotiation. IGRA is rendered toothless.").

<sup>236</sup> GETCHES ET AL., *supra* note 11, at 739-54.

casinos and bingo palaces.<sup>237</sup> Furthermore, Congress' enactment of IGRA, as demonstrated by lower court interpretations of that Act, has effectively nullified the tribes' hard-won legal triumph in *California v. Cabazon Band of Mission Indians*.<sup>238</sup>

Congress effectively extended state regulatory control over the nature, scope and size of that most lucrative form of Indian gaming, now known as Class III gaming. Few states, in this brave new world of cutthroat competition for the gaming dollar, are likely to agree to large-scale, casino-style tribal gaming within their borders unless the tribes are willing to share a substantial portion of their gaming revenues with them. Furthermore, many of the more conservative and traditional tribes likewise question whether gaming is good for their own tribal members who may gamble away their hard-earned money that they should use to support their families.<sup>239</sup>

But even deeper legal and ethical difficulties are presented by the rise of the entrepreneurial tribe. First, such entrepreneurship presupposes a tribal class who, functioning as tribal developers, views their Indian peoples as "embodied" capital. Thus, the "tragedy of development" plays out within Indian Country as tribal members are graded into hierarchical rankings that run unidimensionally from the worst to best workers.<sup>240</sup> Second, unless the entrepreneurial tribe convinces the federal court that its revenues derive from its exploitation of a tribally-generated reservation value, the surrounding state may tax away much of the economic rents derived from that economic activity.<sup>241</sup> Third, state sovereign immunity likely bars the entrepreneurial tribe from suing the state for the redress of any injury from the state's

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<sup>237</sup> *Id.*

<sup>238</sup> 480 U.S. 202 (1987).

<sup>239</sup> GETCHES ET AL., *supra* note 11, at 739-54.

<sup>240</sup> Marshall Berman synthesizes Joseph Schumpeter's and Karl Marx's "creative destruction" concept in describing the disruptive impact of economic development on the social bonds and cultural ties of traditionally underdeveloped societies, such as those of the Indian peoples. He quotes Marx as follows:

All fixed, fast-frozen relations, with their train of ancient and venerable prejudices and opinions, are swept away, all new-formed ones become antiquated before they can ossify. All that is solid melts into air, all that is holy is profaned, and men at last are forced to face . . . the real conditions of their lives and their relations with their fellow men.

MARSHALL BERMAN, ALL THAT IS SOLID Melts INTO AIR 21 (1982).

<sup>241</sup> *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

exercise of governmental power within Indian Country.<sup>242</sup> These factors combine to substantially limit the economic design within which the entrepreneurial tribe can operate in service of tribal self-determination.

### *G. Summary of Tribal Achievement via the Standard Development Model*

The sum total result of the Indian peoples' efforts to realize self-determination via the standard development model of Indian Country has been to fritter away their passions and energies in a fruitless effort to escape their assigned tribal status. In bumping up, again and again, against the brick ceiling of their legally-assigned status, the Indian peoples have demonstrated their tenacity and desire to survive. My suggestion in the next section is that they turn their passions and energies to the very different task of internally reconstructing the tribe to meet the real human needs of their members.

## II

### TRIBES AS RICH NATIONS: SKETCHING AN ALTERNATIVE MODEL OF TRIBAL SELF-DETERMINATION

#### *A. Why the Standard Model of Tribal Self-Determination Has Failed Indian Country*

Two rival interpretive processes must be reconciled if the Indian peoples are to realize meaningful tribal self-determination. The first process constituted the "tribe" as the historical product of non-Indian interaction with the indigenous people of North America. The constructive processes of non-Indian history—war, disease, trade, treaties, common law, and European political and socio-cultural theory—created the tribe as a means to serve non-Indian ends.<sup>243</sup> The second process focuses on the ordinary experiences of Indian people as the contemporary source for re-

<sup>242</sup> The Supreme Court has held that a state's Eleventh Amendment immunity to suit precludes tribes from suing the state. *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991).

<sup>243</sup> Professor Stephen Cornell argues that the "tribe" was created by those European and American negotiators "who searched for and often assumed comprehensive structures of authority or hierarchical political organization" among the Indian people. CORNELL, *supra* note 3, at 78. Indeed, Cornell concludes that "[c]omprehensive political organization at times was even made a prerequisite for [federal] negotiations" with the Indian peoples. *Id.* at 79.

constructing the tribe.<sup>244</sup> The following discussion traces the failure of the former interpretive idea as a means for tribal self-determination; the latter interpretive idea is addressed in the next section.

The first interpretive process hierarchically notched the tribe into American law and governance as “domestic dependent nations.”<sup>245</sup> It provided the structure for the channeling of American values into Indian Country.<sup>246</sup> Its goal was to progressively remake the Indian peoples in the American image. Its failure to realize this goal by the 1880s counseled its abandonment in favor of the Indian allotment policy.<sup>247</sup> Ironically, the “tribe” was revived in the 1930s by Indian Commissioner John Collier, and later strengthened in the 1970s and 1980s by Presidents Nixon and Reagan, as the express vehicle for indigenous self-determi-

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<sup>244</sup> Professor Cornell believes that there is evidence of the Indian peoples’ self-renewal:

The political resurgence of the last few decades has been a cultural resurgence as well. Tribal languages are being taught in some reservation schools. Many young people are showing a new interest in their heritage. Indian writers and painters have immersed themselves in the traditions of their peoples, rearticulating them in new ways. The symbols of Indianness, from bumper-sticker slogans to religious fetishes, are becoming more visible, not less. Much of this trend reflects an attempt by some individuals to locate their own roots, to touch base with some identity more substantial than the dominant culture seems able to provide, an attempt to put a thicker flesh on the bones of their self-concept. The question is whether this cultural resurgence will be realized in actual patterns of life and action or will remain simply a veneer, an overlay on lives shaped to a large degree by the non-Indian world, a collection of icons that symbolize an identity and a past but organize little of contemporary life.

*Id.* at 212.

<sup>245</sup> *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

<sup>246</sup> Cornell contends that the Europeans and Americans consciously sought to transform the Indian peoples into tribes in order to “reproduce the processes of interstate politics by which their own external relations were governed.” CORNELL, *supra* note 3, at 77.

<sup>247</sup> Cornell describes this process of “de-tribalization” via the Indian allotment legislation in these terms:

Allotment . . . specified a new set of incorporative relationships . . . Indians were able to retain significant control over land and related resources, but only via allotment. [E]very Indian taking up allotment . . . [became] a citizen of the United States . . . [and the] act envisioned both the individualization of tribal property and the dissolution of tribal polity. Indians were to be incorporated as individuals into both the economic and political structures of the larger society. It was the ultimate form of control: the end of the tribe itself as a political and social entity.

*Id.* at 59.

nation.<sup>248</sup> Despite this organizational refashioning of the tribe, it remains the means whereby American technology, financial interests, and commercial and social ideas are channeled into Indian Country.<sup>249</sup>

Why this tribal self-determination strategy has failed Indian Country is evident from the practical counsel it offered to the would-be self-determining tribe. In paraphrase it tells the tribe that:

You must consciously remake yourself in a strategically minded, adaptively useful and symbolically powerful way to become successfully self-determining.<sup>250</sup> Strategically, you must identify and mobilize those resources on your reservation that can serve as tools for self-determination.<sup>251</sup> Adaptively, you must retool your inherited traditions and cultural beliefs as means to successfully interact with the surrounding non-Indian economies and governments.<sup>252</sup> Symbolically, you must recast your government and legal institutions so as to reasonably overlap with the American society's ruling notions of due process and equal protection.<sup>253</sup> In brief, you must be-

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<sup>248</sup> Indian Commissioner John Collier recognized in the 1930s, according to Professor Cornell, "the collapse of indigenous [Indian] political [institutions]." *Id.* at 95.

Collier's solution was to "insert individual Indians into the institutional structures of the larger society, and those structures would be built into Indian communities themselves." *Id.* at 94.

<sup>249</sup> Collier's hope was that "[a]s Indian tribes voluntarily formed constitutional governments, undertook the development of their own resources, and joined with the federal government in the assault on poverty and ignorance, assimilation would necessarily follow." *Id.* at 95.

<sup>250</sup> *Id.*

<sup>251</sup> Such counsel invites tribes to look beyond "relying exclusively on federal funding and gaming to build tribal coffers . . . [and use] tax exempt bonds as a means of ensuring their economic independence and tribal sovereignty." Melissa L. Gedachian, *Safeguarding Sovereignty with Tax Free Bonds*, 13 INDIAN REP. 18 (1997). This article goes on to say that "experts agree that training tribal members in finance is crucial for the future of tribal sovereignty." *Id.* at 20.

<sup>252</sup> Dale Rood, a Turtle Clan representative to the Oneida Nation and part-time special projects technician in the Nation's management information services department, aspires to use the Internet as a means of extending tribal sovereignty and cultural renewal:

We're using the Internet to preserve our language and culture, but also to enhance our lifestyle. We think it's important to maintain that website because we see it as an opportunity to tell our own story. Many times our website is the first impression people will have of the Oneidas.

Marguerite D. Carroll, *Indians on the Internet: Link to a Legacy, Path to the Future*, 13 INDIAN REP. 12, 13 (1997).

<sup>253</sup> The integration of tribes into American society has been ongoing since the 1930s and contemplates, according to Stephen Cornell, "the reproduction of dominant-group institutions and values—in particular, elected representative govern-

come non-Indian governments and societies if you are to realize self-determination.<sup>254</sup>

The only problem with this strategy is that it does not work! The Eastern Cherokees, beginning after their early interaction with American colonists, sought to follow this counsel by developing a written tribal alphabet, constitution, courts, schools, as well as law and order codes, modeled on those extant in the surrounding American society. But their adaptive efforts did not save them, or the other civilized eastern Indian tribes, from summary congressional removal in the 1830s west of the Mississippi River.<sup>255</sup> Likewise, the Suquamish Tribe's adoption in the 1970s of a tribal criminal code guaranteeing fundamental due process to all criminal defendants did not sustain its assertion of inherent criminal jurisdiction over two, admittedly, very "bad" non-Indian men on its reservation.<sup>256</sup> It just did not matter, according to Justice Rehnquist's opinion, how successfully adapted the Suquamish people had become, the Indian tribe had, early on, been divested by Marshall's Indian law opinions, of its inherent criminal jurisdiction over non-Indian defendants.<sup>257</sup>

Viewing the tribe as an adaptive unit has likewise failed as a means of economic development within Indian Country. Frustrated by the lack of observable economic growth within Indian Country, contemporary development experts have sought to identify those "break-away" tribes who can serve as emulative models for tribes who are arguably adrift in a sea of self-determination opportunities.<sup>258</sup> Listless and becalmed tribes, too, can hum with entrepreneurial energy if only they would governmentally, technologically and commercially restructure themselves so as to take advantage of these opportunities.<sup>259</sup>

Indian law experts have also resorted to this first interpretive process to diagnose and explain the root cause of the contemporary failure of tribal self-determination. The prescriptions they offer as solutions focus on what the federal government should

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ment, market-oriented economic organization, corporate business structures—within Indian communities." CORNELL, *supra* note 3, at 152.

<sup>254</sup> *Id.*

<sup>255</sup> GETCHES ET AL., *supra* note 11, at 93-128.

<sup>256</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210-11 (1978).

<sup>257</sup> *Id.*

<sup>258</sup> Stephen Cornell, *Sovereignty, Prosperity and Policy in Indian Country Today*, 5 COMMUNITY REINVESTMENT 5, 5-13 (1997).

<sup>259</sup> *Id.*

do to restore self-determining status to the tribe. First, the federal government should insulate the tribe from state intrusion upon its essential governmental, economic and regulatory activities.<sup>260</sup> Second, the federal government should provide sufficient economic infrastructure to the tribe so that it can pursue a reasonable economic and social recovery strategy.<sup>261</sup> Third, the federal government should restore its historic tradition of bilateral and transparent negotiation with the tribe as the basis for a new government-to-government relationship.<sup>262</sup> Fourth, the federal government should embody in a new “sovereign trust duty” those security guarantees that are essential to tribal self-determination.<sup>263</sup> Doubtless, the route to tribal self-determination would be smoothed if these prescriptions were adopted by the federal government. But, as both a practical and conceptual matter, federal acceptance of these prescriptions would amount to the overthrow of this governing interpretive process.

These advocates on behalf of the Indian peoples are undoubtedly sincere in their desire to address the many and real problems that exist within today’s Indian reservations. They hope to better the Indian peoples’ material conditions—upgrade their health status, increase their per capita income, increase their children’s educational attainment levels, and generate more reservation-based employment opportunities. But the Indian peoples are aware, as are many non-Indian peoples, that it is not the deprivation of material options that has produced today’s dispirited generation of children, both on-reservation and off-reservation. Lost Indian children, like some non-Indian children, seek their identity through peer-governed rituals of gang membership, Indian-on-Indian violence, substance abuse, flirtations with suicide, and other forms of antisocial behavior. These phenomena evidence a deeper crisis within contemporary Indian societies than cannot be encompassed within a handbook on tribal

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<sup>260</sup> Gloria Valencia-Weber, *Shrinking Indian Country: A State Offensive to Divest Tribal Sovereignty*, 27 CONN. L. REV. 1281 (1995).

<sup>261</sup> Raymond Cross, *Sovereign Bargains, Indian Takings, and the Preservation of Indian Country in the Twenty-first Century*, 40 ARIZ. L. REV. 425 (1998) [hereinafter Cross, *Sovereign Bargains*].

<sup>262</sup> Charles Wilkinson, *The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Rights-Endangered Species Secretarial Order*, 72 WASH. L. REV. 1063, 1065 (1997).

<sup>263</sup> Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109.



economic development.<sup>264</sup>

Socio-biologists tell us that the creation of such “wolf-children” within Indian Country is the expected product of systemically ill communities—communities unable to come to grips with the pathologies such as fetal alcohol syndrome, child abuse, alcoholism, chronic unemployment and domestic violence.<sup>265</sup> Authentic tribal self-determination will require the Indian peoples to acknowledge and directly confront this painful reality. Current federal Indian policy exteriorizes responsibility for “doing something” about this reality to the BIA or IHS, as well as other federal agencies. So far, none of the federally-sponsored programs or grants have done much to address the underlying generative processes that produce these societal pathologies within Indian Country.<sup>266</sup> Only by reinternalizing these problems within the Indian communities themselves will lasting and sus-

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<sup>264</sup> The success of Indian gaming enterprises on some reservations has brought new addictions and new dangers to the Indian communities. It is not “uncommon at many gaming facilities to see children roaming the halls, playing video games or swimming at the pool—often unsupervised—while their parents are gambling.” See Marguerite D. Carroll, *Who’s Minding the Kids?*, 14 INDIAN REP. 18 (1998). The most obvious community costs involve Indian “families going there anyway and casinos are forced to deal with things like children being left in cars for hours.” *Id.* at 19.

<sup>265</sup> Sociologist James L. Coleman explains such systemically ill communities as ones where “the social system comes to consist of individualistic solutions to individual problems; with all suffering at the hands of each as each carries out his acts unconstrained by their consequences for others.” James S. Coleman, *Norms as Social Capital*, in ECONOMIC IMPERIALISM: ECONOMICS APPLIED OUTSIDE THE FIELD OF ECONOMICS 153 (Gerard Radnitsky & Peter Bernholz eds., 1987).

1997 BIA statistics estimate that 375 gangs with about 4,650 members operate in or near Indian Country. Tribes such as the Three Affiliated Tribes of the Fort Berthold Reservation in North Dakota are only now trying to get a handle on this issue. The principal of New Town High School, Spencer Wilkinson, says that “[w]e have a lot of these problems—drug abuse, alcohol abuse—that big cities have, but we’re out here in the boondocks.” See Melissa Goldblatt, *Getting A Grip On Gangs*, 14 INDIAN REP. 26 (1998).

This tribe has taken the first step among tribes to seek to coordinate their ordinances with those of the BIA, city and county authorities in an effort to address gang-related violence. *Id.*

<sup>266</sup> The Justice Department’s recent study regarding violent crime among America’s different races confirms this difficult reality. While violent crime rates have dropped significantly among other racial groups, the incidence of violent crime among American Indians remains disturbingly high. Indians are twice as likely to be victims of violent crimes than blacks, whites or Asians. Indian women were victimized by their partners twice as often as black women. The study by the Bureau of Justice Statistics looked at statistics for rape, sexual assault, robbery, aggravated assault, and simple assault for the period 1993 through 1998. See MISSOULIAN NEWSPAPER, Mar. 19, 2001, at A5.

tainable solutions to these difficulties be crafted and successfully implemented.<sup>267</sup>

### B. Structuring the Transcendent Model of Tribal Self-Determination

Folding the tribe into non-Indian history has locked the Indian peoples into an unyielding interpretive process that, as told by my four-year-old daughter's pre-school song, is "too deep to go under it, too wide to go around it, too high to go over it, so I guess we will have to go through it."<sup>268</sup> That is exactly what the Indian peoples will have to do. But "going through" this veil of non-Indian history will require the Indian peoples to expend much social and emotional energy. By interpolating the tribe into non-Indian history, federal policy makers sought to co-opt the Indian peoples' underlying cultures and traditions into America's melting pot. Only by creating disjunctures between this interpolated history through tactics of cultural and social resistance have the Indian peoples survived.<sup>269</sup> This strategy is illustrated by the young Black Elk's vision:

And as I looked and wept, I saw that there stood on the north side of the Starving camp a Sacred man who was painted red all over his body, and he held a spear as he walked into the center of his people, and there he laid down and rolled. And

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<sup>267</sup> *Id.*

<sup>268</sup> Lyrics available upon request.

<sup>269</sup> The Indian people became "props" setting the stage for the American epic about the conquest of the West. Professor Nathan Glazer argues the *Winning of the West*, written on an epic scale by Teddy Roosevelt, created the national text of "unabashed nationalism" for the displacement and dispossession of the Indian people. The Indians in Roosevelt's text are unredeemably cruel and treacherous. He characterizes the Indians thus:

Not only were they very terrible in battle, but they were cruel beyond all belief in victory . . . . The hideous, unnameable, unthinkable tortures [practiced] by the red men on their captured [foes'] tender women and helpless children, were such as we read of in no other struggle, hardly even the revolting pages that tell the deeds of the Holy Inquisition.

Glazer, *supra* note 43, at 12.

Given the unredeemable Indian character, Roosevelt feels no need for a retrospective national apology for their destruction by federal military forces:

Looking back, it is easy to say that much of the wrong-doing could have been prevented; but if we examine the facts to find out the truth, not to establish a theory, we are bound to admit that the struggle could not possibly have been avoided. . . . Unless we were willing that the whole continent west of the Alleghenies should remain as unpeopled waste, the hunting ground of savages, war was inevitable."

*Id.* at 12-13.

when he got up it was a fat bison standing there, and where the bison stood a Sacred herb sprang up right where the tree had been in the center of the nation's hoop. The herb grew and bore four blossoms on a single stem while I was looking—a blue, a white, a scarlet and a yellow—and the bright rays of these flashed to the heavens.<sup>270</sup>

Cultural survival requires much psychic and social energy and has not been accomplished without significant damage to the Indian peoples. Psychologists have diagnosed a syndrome they have named “inter-generational post-traumatic stress disorder” to describe the long term effect of two hundred years of federal policy on the Indian peoples.<sup>271</sup> Some have characterized it as a “spiritual injury” in these terms:

It is apparent that the psyche of the community recognized the wounding of the community, and that this awareness in turn was perceived as a wounding of the psyche. Harmony had become discord and the community's unconscious perception was that the world was unfriendly and hostile. The problems that were manifested and verbalized were merely symptoms of a deeper wound—the soul wound.<sup>272</sup>

Just as new therapeutic approaches have been developed that address the inter-generational transmission of Indian parental traumatic experiences and responses to their children, so too must a new theory of the tribe seek to support the Indian peoples' growing societal and cultural revitalization efforts.<sup>273</sup> Only by reconnecting the revitalizing sphere of Indian socio-cultural life to the tribal governmental sphere of legitimate authority will tribal life-worlds be restored.

### *C. Linking Tribal Self-Determination to the Restoration of Tribal Life-Worlds*

Behind the positivistic legal formulation of the tribe—defined by federal Indian common law, treaties and statutes—exists the real world of the Indian peoples' experiences. This world has rarely interested those federal policy makers who fashioned decisional rules for resolving practical conflicts between Indians and non-Indians over land, trade, water, economic activities, natural

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<sup>270</sup> BONNIE DURAN ET AL., *NATIVE AMERICANS AND THE TRAUMA OF HISTORY* 70 (Russell Thompson ed., 1998).

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

resources, and crime.<sup>274</sup> Indeed, it was their studied lack of interest in the almost overwhelming diversity of Indian life-worlds that enabled the cultural survival of the contemporary Indian peoples. Restoring tribal life-worlds requires a new tribe, one that reconnects the Indian peoples with a newly-legitimized tribal sphere of governance. As A. K. Sen persuasively argues in his new book, *Development As Freedom*, only by relinking democratic governance to a society's defining value orientations will the derived and surface political expressions legitimate governmental action.<sup>275</sup> Only by re-embedding the tribe, long detached from the underlying tribal society by the IRA and similar positivistic legal initiatives, will tribal governmental action accord with the real interest of the Indian peoples.<sup>276</sup>

Sen structures societal governance as the primary means of realizing human freedom. He offers three principles for the development of this type of democratic governance. First, full development of human capabilities demands that any society accord to all its members the opportunity for meaningful social and political participation.<sup>277</sup> Second, individuals and groups within that society must be encouraged to conceptualize their needs and demands in a socially comprehensible manner that can be politically expressed through their governing institutions.<sup>278</sup> Third, the governing institutions must demonstrate that they "hear" these demands and respond to these needs through governmental ac-

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<sup>274</sup> This lack of interest in the contemporary Indian world is quite understandable from the non-Indian standpoint. Teddy Roosevelt in his multi-volume epic, *Winning the West*, viewed the Indian world as "finished" and sought to give "moral closure" to that outcome. The Indian world had ended and the white world was beginning in America according to Roosevelt's historical narrative of the West. Thus, Roosevelt's lack of interest in the Indian peoples is part of a larger fashioning of a new American narrative described by Professor White:

The historical narrative . . . reveals to us a world that is putatively "finished," done with . . . . Insofar, as historical stories can be completed, can be given narrative closure, can be shown to have had a *plot* all along, they give to reality the odor of the *ideal* . . . . The demand for closure in the historical story is a demand, I suggest, for moral meaning, a demand that sequences of real events be assessed as to their significance as elements of a *moral drama*.

DENNIS K. MUMBY, COMMUNICATION AND POWER IN ORGANIZATIONS: DISCOURSE, IDEOLOGY AND DOMINATION 110 (1988) (quoting H. WHITE, TOPICS OF DISCOURSE: ESSAYS IN CULTURAL CRITICISM 24 (1980)).

<sup>275</sup> AMARTYA KOMAR SEN, DEVELOPMENT AS FREEDOM 145-59 (1999).

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

tion that demonstrates societal accountability.<sup>279</sup>

By giving both a “thin” and “thick” account of how the application of Sen’s model may contribute to the restoration of tribal life-worlds, I hope to reconcile these two rival processes. At the thin level, I propose several background principles that are necessary, but not sufficient, for reconnecting the new tribe and the underlying tribal societies. At the thick level, I tell a story about how real tribal people—the Mandan, Hidatsa and Arikara peoples of the Fort Berthold Reservation—may apply these principles to recover, socially and economically, from the devastating effects of the 1949 federal taking that virtually destroyed their reservation. My goal in telling this story is to reweave orienting tribal beliefs and values of these Indian peoples into a coherent pattern of socially comprehensible governmental action. By combining these thin and thick accounts of tribal restoration, I hope to reconcile these two rival interpretive views within the body of a new, unifying entity—the “new tribe.”

#### *D. Taking the First Steps Toward the New Tribe*

Only the “new tribe” can restore the communicative power of the Indian peoples and thereby give content to the now empty concept of tribal self-determination. The Supreme Court in its 1978 decision in *Santa Clara Pueblo v. Martinez*<sup>280</sup> recognized that only the Indian peoples can speak to those basic constitutional issues, such as the eligibility criteria for tribal membership, that define a distinct peoples. The Court’s refusal to hear a female tribal member’s challenge to the Pueblo’s ordinance that denied tribal membership to the children of those tribal women who choose to marry outside of the tribe accorded “proper respect for tribal sovereignty” according to the majority.<sup>281</sup>

The *Martinez* decision permits the fundamental reworking of a tribe’s relationship to its constituent societal elements, whether traditional or modern, without undue interference from the federal government. That decision wisely leaves it up to the respective Indian peoples to determine when, if ever, they will fully adapt their institutions to accord with prevailing non-Indian notions of wise societal governance. The contemporary Indian peo-

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<sup>279</sup> *Id.*

<sup>280</sup> 436 U.S. 49 (1978).

<sup>281</sup> *Id.* at 60.

ples are left to take the next step on their own to realize the restoration of tribal life-worlds.

### 1. *The "Thin" Theory of the New Tribe*

For those Indian peoples who choose to take the next step, I offer the following "thin" and "thick" observations to guide them in this endeavor. At the thin level, I offer two background principles that are necessary for creating the new tribe. First, these Indian peoples must be reasonably immune to what Professor Mary Midgley calls the "menace of fatalism." Many non-Indian people, as well as some Indian people, are deeply skeptical of the ability of today's Indian peoples to realize tribal self-determination. That skepticism is sometimes expressed in terms of the Indian peoples' innate genetic, biological or cultural characteristics that will doom any real chance for tribal self-determination.<sup>282</sup> While the Indian peoples must realistically assess those dangers and risks that hedge their opportunities for self-determination, they must not allow such fears to paralyze tribal action by giving undue weight to a non-Indian view of history that has long since written the Indian peoples' epitaph.<sup>283</sup>

Second, the Indian peoples must adopt the principle of "enoughness" as expressing their confidence that they can use their existing material and social resources effectively to re-define and meet their pressing human development needs. This is a realistic presumption given that most Indian peoples have the available resources to meet the material subsistence needs of their members. Such a base is the reasonable starting point for

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<sup>282</sup> Teddy Roosevelt saw the demise of the Indian peoples as inevitable given that "[d]uring the past three centuries, the spread of the English-speaking peoples across the world's waste spaces has been not only the most striking feature in the world's history, but also the event of all others most far-reaching in its effects and importance." Glazer, *supra* note 43, at 12.

<sup>283</sup> Professor Clark Wissler asks "Did the Indians Live in Vain?":

When we look back over the spectacle of Indian annihilation, the ruthless advance of the frontier crushing out the lives of Indians on every hand, though sacrificing a lot of white blood to achieve this end, we moved to ask: Did the Indian live in vain? Was all that he did, struggled for, fought for ten thousand years to be obliterated in three centuries? Was it misplaced charity on the part of the victors to put their helpless victims on reservations, to be wasted by disease, hunger and poverty, and later do everything possible to keep them alive merely to live as minorities? . . . There are no satisfactory answers.

CLARK WISSLER, *INDIANS OF THE UNITED STATES* 326 (1940).

the Indian peoples to begin the creation of the new tribe.<sup>284</sup>

2. *The "Thick" Theory of the New Tribe: A Case Study of the Mandan, Hidatsa and Arikara Peoples' Struggle for Social and Economic Recovery from the 1949 Garrison Taking*

The removal of the Mandan, Hidatsa and Arikara peoples in 1953 from the Fort Berthold Reservation to make way for the Garrison Dam was perhaps the most traumatic event they faced since the 1837 smallpox epidemic devastated their population, virtually wiping out the Mandan people. Although the trauma imposed on these peoples played its way out in many destructive private and public displays—such as greatly increased welfare dependency, domestic violence and alcoholism—I focus on its catalytic effect in spurring subsequent tribal action directed to social and economic recovery of these Indian peoples from the debilitating effects of the Garrison taking.<sup>285</sup>

Historian Roy W. Meyer correctly assigns the bulk of the blame for the Garrison Dam to "Congress and . . . those segments of the public who brought pressure on their elected representatives to have it built."<sup>286</sup> But it is the tribal people and their leaders who ultimately bear the responsibility to frame an adequate response so as to ensure their eventual recovery from this man-made disaster. I evaluate two distinct tribal responses to this disaster and evaluate their potential for facilitating tribal col-

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<sup>284</sup> The starting point for authentic self-determination may well be the Indian peoples' recognition of this principle:

The shift to postmaterialist values calls into question the distribution of power: deep shifts in existing structures are needed to make and execute the kind of choices that will lead to sustainability. Therefore sustainability is inseparable from personal and collective empowerment. A revitalized democratic spirit, expressed in a myriad of forms, indicates the viability of a participatory political culture . . . . Individuals in an expansive democratic system do not so much discover the common good as create it, by interacting with each other and constructing shared purposes . . . self-governance in the public sphere helps transform conflicting interests into common ones while at the same time promoting individual autonomy and freedom. Personal transformation and social transformation are thus reciprocally related.

STEPHEN WOOLPERT, *THE PRACTICE OF TRANSFORMATIONAL POLITICS: AN OVERVIEW* 172-73 (Stephen Woolpert et al. eds., 1998).

<sup>285</sup> See Cross, *Sovereign Bargains*, *supra* note 261, at 477-509.

<sup>286</sup> ROY W. MEYER, *THE VILLAGE INDIANS OF THE UPPER MISSOURI: THE MANDAN, HIDATSA AND ARIKARA* 233 (1977).

lective action directed to the social and economic recovery of these peoples from the 1949 Garrison taking.

a. *Response 1: The Tribal Decision to Spend the Entire \$7.5 Million in Compensation for the 1949 Garrison Taking as Per Capita Payments to Individual Tribal Members*

Political in-fighting between two powerful tribal leaders—Martin Cross and Carl Whitman, Jr.—focused on how to spend the \$7.5 million payable to the tribal peoples as just compensation for their economic losses stemming from the Garrison taking. Cross favored the per capita distribution of virtually all of the monies to individual tribal members, while Whitman favored the retention of most of these monies in tribal programs to address the long-term recovery needs of the people.<sup>287</sup>

This issue dominated tribal politics from the 1950 tribal council election until 1957 when the final distribution plan for these monies was approved by Congress. Cross used his pro per capita platform in the 1950 election to defeat Whitman. The BIA, in the throes of the termination era, sought to exploit this issue as grounds for proposing the termination of the tribe. Indian Commissioner Myer concluded that if the tribal government was competent to spend millions of dollars, then it no longer needed the supervision of the BIA.<sup>288</sup> Cross and the tribal council responded to Myer's proposed termination of their tribe in an artful manner: "[W]e are not opposed to the withdrawal by the government of any *help* that they give us . . . . We only oppose their *interference* with our management of our own property and money."<sup>289</sup> This artful dodge by the tribal council worked to prevent the BIA's proposed termination of the Mandan, Hidatsa and Arikara peoples.

While Cross and Whitman battled over money and tribal power, the coming reality of the destruction of the Fort Berthold Reservation was graphically depicted on the cover of the *Fort Berthold Agency News Bulletin*. Lake Sakakawea, the reservoir to be created by the Garrison Dam, was portrayed as a sea serpent spreading its tentacles over a radically segmented and di-

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<sup>287</sup> *Id.* at 230.

<sup>288</sup> *Id.* at 231.

<sup>289</sup> *Id.*



vided Fort Berthold Reservation.<sup>290</sup>

The BIA—given the traumatized daze of the tribal people—struggled to formulate governmental, economic and social responses to this new reality. One BIA inspired remedy—relocation—would move young Indian men and women from the reservation to urban areas such as Denver, Oakland and Chicago. The hope was that their chances for employment, after the completion of a trade or craft apprenticeship, would materially improve their life chances. Many young people from Fort Berthold went through the “relocation” process in the 1950s and 1960s, but few, if any, experienced any permanent improvement in their material circumstances.<sup>291</sup>

The new agency superintendent, Ben Reifel, strongly supported the relocation program stating that “[a] reservation is fast becoming just a place where some Indians were born. The United States is the Indian citizen’s ‘reservation’ today.”<sup>292</sup> A later superintendent, Ralph Shane, similarly asserted that the Indians would one day thank the United States because their removal is “by no means the end of the trail for any people, any culture, any way of life, nor an ascending economy.”<sup>293</sup> He believed that the Indians’ removal, just like their evacuation from Like-A-Fishhook Village in the 1880s would lead to their ultimate renewal if they could rise to meet the challenge.<sup>294</sup>

The BIA’s vision was to recreate Fort Berthold as new, dispersed tribal communities on the residual high-plains of the reservation. These new communities—Mandaree, Twin Buttes and New Town—sought to fuse the three tribal groups into one new tribal identity. Indeed, the name “Mandaree” is a composite of the syllables *Mandans*, *Hidatsa* and *Arikaree*.<sup>295</sup> But the reality of physical separation on the desolate high plains imposed severe limits on the governmental and economic re-integration of the Fort Berthold Reservation. The deteriorating social welfare status of the Indians is reflected in the substantial decline of their income from farming and grazing leases. While 39% of their income came from that source in the pre-dam era, only 10% of their income derived from that source after the Garrison Dam.

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<sup>290</sup> *Id.* at 233.

<sup>291</sup> *Id.* at 226.

<sup>292</sup> Meyer, *supra* note 286, at 226.

<sup>293</sup> *Id.* at 228.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

Welfare, which had been a negligible source of income for the Indians prior to the dam, increased nine-fold after the Garrison Dam.<sup>296</sup>

The most telling effect of the Garrison Dam has been the absorption of the Indian peoples into the surrounding non-Indian institutions and economy. Their distinctive Indian schools disappeared and most Indian children either attended public school or made the long trek off-reservation to the BIA boarding schools.<sup>297</sup> Young Indian men and women began to see themselves as primarily wage-laborers, hiring out as help on non-Indian run ranches and farms or relocating off-reservation. This fact is reflected in the increase in reservation wage income from 14% in the pre-dam era to 43% in the post-dam era.<sup>298</sup> While the scope of psychological damage cannot be fully summarized in statistics, the Mandan, Hidatsa and Arikara peoples clearly had to face substantial adjustment challenges in adapting to their new reservation setting.<sup>299</sup>

*b. Response 2: The Mandan, Hidatsa and Arikara Peoples' Long Struggle to Recover Just Compensation for the 1949 Garrison Taking*

In 1984 the Mandan, Hidatsa and Arikara peoples had the opportunity to renew their claim for just compensation for the 1949 Garrison taking. The Garrison Diversion Unit Commission (GDUC), an eleven-member congressionally appointed body, concluded that these Indians had borne a disproportionate share of the economic burden in having the Garrison Dam and reservoir located on their tribal homelands.<sup>300</sup> It based this finding on its review of the legislative record of the 1949 Takings Act. The GDUC was convinced by this review that the Indians had suffered devastating economic, cultural and social losses due to the federal government's taking of their most productive agricultural lands. It also found that Congress may have failed to make the

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<sup>296</sup> *Id.*

<sup>297</sup> Meyer, *supra* note 286, at 228.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> This was the finding of the Garrison Diversion Unit Commission (GDUC), an eleven-member congressional commission that was created in 1984 to assess the impacts of the Garrison Project on the peoples of North Dakota. See *Recommendations of the Garrison Diversion Unit Commission on H.R. 1116, A Bill to Implement Certain Recommendations Made Pursuant to Pub. L. 98-360: Hearings on H.R. 1116 Before the Subcommittee on Water and Power Resources*, 99th Cong. 114 (1985).

Indian peoples whole for their economic losses arising from the 1949 taking.<sup>301</sup> It therefore directed the Indians' trustee—the Interior Secretary—to hold administrative hearings on the Indians' just compensation and related claims.<sup>302</sup>

Interior Secretary Donald P. Hodel was directed by the GDUC to establish a secretarial commission that would examine the Indians' just compensation and related claims. He was also directed to recommend appropriate implementing legislation if his commission concluded that the federal government had failed to justly compensate these Indians for their losses arising from the taking. Secretary Hodel established the Joint Tribal Advisory Committee (JTAC) by secretarial charter in 1985 to hear and evaluate the Indians' claims arising from the 1985 taking of their reservation.<sup>303</sup>

*c. The Mandan, Hidatsa and Arikara Indians Just Compensation Case Before the Joint Tribal Advisory Commission (JTAC)*

The hearings before the JTAC provided the organizational catalyst for these tribal peoples to join together and present personal testimony and other evidence regarding the devastating effects of the 1949 taking on their culture and economy. The JTAC construed its charter so as to allow the Indian people to

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<sup>301</sup> *Id.* at 114.

<sup>302</sup> It recommended that the Interior Secretary establish a five-member commission to assess and report on the steps necessary to "complete the indemnification of the Indian communities of North Dakota that were disrupted by construction of Pick-Sloan Missouri Basin Program dams and reservoirs." *Id.* at 74.

The GDUC recommended that the Interior Secretary appoint the commission no later than January 31, 1984, to address the following issues on the Fort Berthold Indian Reservation:

- a. Full potential for irrigation.
- b. Financial assistance for on-farm development costs.
- c. Replacement of infrastructure lost by the creation of the Garrison Dam.
- d. Preferential rights to Pick-Sloan Missouri River Basin power.
- e. Development of shoreline recreational potential.
- f. Return of excess lands.
- g. Additional financial compensation.
- h. Protection of reserved water rights.
- i. Other items the five-member commission may deem appropriate.
- j. Funding of all items from Garrison Diversion Unit funds, if authorized.

*Id.* at 187.

<sup>303</sup> Interior Secretary Donald P. Hodel created the JTAC on May 10, 1985, and the committee submitted its final report to him on May 23, 1986. See S. REP. NO. 102-250 (1992).

present relevant expert and lay testimony regarding their just compensation claim against the United States.<sup>304</sup> They urged the JTAC to review all the circumstances surrounding this federal taking. Such a comprehensive review was essential for the commission's reliable inquiry into the fairness of the taking of the Fort Berthold Reservation.

Whether the federal government had made a good faith effort to justly compensate the Mandan, Hidatsa and Arikara peoples was the most significant issue confronted by the JTAC. That issue focused the JTAC's attention on the administrative and legislative record that ostensibly justified the 1949 Garrison taking.<sup>305</sup>

Testimony by natural resource economists and related experts aided the JTAC in its examination of the Indians' claims.<sup>306</sup> They provided the JTAC with a valuation theory of Indian lands that fulfilled the "make whole" command of the Just Compensation Clause.<sup>307</sup> Other expert testimony provided the JTAC with historical and sociological evidence of the taking's devastating effects on the social and cultural life of these Indian people.<sup>308</sup>

But the Indians' claim for just compensation was strenuously opposed by the BIA.<sup>309</sup> Indeed, Secretary Hodel eliminated the

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<sup>304</sup> The GDUC's finding that the "tribes of the . . . Fort Berthold Indian Reservation bore an inordinate share of the cost of implementing Pick-Sloan Missouri River Basin Program mainstem reservoirs," and its direction to the Secretary that he "find ways to resolve inequities borne by the tribes" were interpreted by the JTAC as a warrant for hearing the Indians' just compensation claims. See S. REP. NO. 102-250, at 3 (1991).

<sup>305</sup> *Id.*

<sup>306</sup> Dr. Cummings valued tribal lands that were taken by estimating the "flow of the land base earnings or income that was attributable to that resource." He then "capitalized [the expected income flows] at 3.5% which was then the Congressionally-mandated rate in 1950, and then he raised that [amount] to 1986 dollars. At the time of the filing of the JTAC report, this totaled \$178.4 million for the Fort Berthold Reservation." See Ronald G. Cummings, *Valuing the Resource Base Lost by the Three Affiliated Tribes as Result of Lands Taken from Them for the Garrison Project 47* (Feb. 13, 1986) (unpublished report prepared for the JTAC, on file with the author).

<sup>307</sup> The JTAC chairman, General Murry, testified at the hearings on S. 168, the Equitable Compensation Act for the Three Affiliated Tribes, that the enactment of just compensation legislation on behalf of these tribes would serve as a means for helping the tribes re-establish a viable economic base "that was destroyed by the construction of the [Garrison Dam and Reservoir]." *Id.* at 2.

<sup>308</sup> *Id.*

<sup>309</sup> The Senate report accompanying S. 168 recounts that the BIA's testimony was "strongly opposed to S. 168 [because] the United States is under no continuing legal liability to provide any additional compensation to [the tribes]." S. Rep. No. 102-250, at 3 (1985).

just compensation issue from the JTAC's charter despite the GDUC's explicit directive to the contrary.<sup>310</sup> However, the JTAC construed the "other issues" portion of its charter so as to allow it to hear the Indians' just compensation claim. The BIA argued that the Takings Act barred this claim. But the GDUC's express direction and its own secretarial charter persuaded the commission that it could examine the equity of the Indians' just compensation claim.<sup>311</sup>

*d. The Resolution of the Indians' Just Compensation Claim by the JTAC*

The Indians argued before the JTAC that Senator Arthur V. Watkins' Senate Indian Affairs Committee had demonstrably failed to justly compensate them for their taken lands. They argued that their lands should have been valued on the same basis as non-Indian lands that served comparable government and public welfare functions.<sup>312</sup> They contended that this valuation standard would fulfill two important underlying goals of the Just Compensation Clause. First, such a valuation standard would ensure the continuing viability of the affected Indian peoples as a recognized government consistent with the purpose of their 1886 agreement with the federal government.<sup>313</sup> Second, such a valuation standard would discourage future "rent seeking" initiatives by Indian congressional committees that sought to exploit their plenary power over Indian lands for their non-Indian constituents' benefits.<sup>314</sup>

The Indians' treaty-reserved lands formed the essential trust *res* that supported their governmental and economic infrastructure. As land, it was comprised of the 156,035 acres of easily irrigable bottom lands that were taken by the federal government. Destruction of those lands imposed uncompensated eco-

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<sup>310</sup> *Id.*

<sup>311</sup> See *Hearings on S. 168*, at 30-1 (1985).

<sup>312</sup> Cummings concluded the Fort Berthold Indian Reservation represented a dedicated public entity whose land possessed a value to the tribal community that far transcended its fair market value. Cummings, *supra* note 306, at 14-15.

<sup>313</sup> Cummings points to the Indian congressional committees' keen awareness, in light of the MRBI reports, that the Fort Berthold Indians would lose the vast majority of their arable and irrigable land base essential for carrying out the purpose of the 1886 agreement. *Id.* at 23-24.

<sup>314</sup> The Supreme Court enunciated the equivalent value or standard for just compensation in *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326, 341 (1893).

nomic losses on those Indians that could be measured only by the capitalized values of the expected future incomes that would have been generated by those lands.<sup>315</sup>

The JTAC recognized that the federal government had a legal duty to make the Indians whole for their economic losses. Therefore the JTAC directed Dr. Ronald G. Cummings, a leading natural resource economist, to do an assessment of the Indians' economic losses imposed by the 1949 taking.<sup>316</sup> He was directed to use known and accepted 1949 valuation standards as the means to capitalize the stream of income the Indians would have received from those lands. Such a valuation approach replicated Congress' 1946 valuation standard that required the War Department to provide the Indians with the "in-kind" replacement value of their taken lands. The War Secretary had been directed to provide the Indians with land comparable in quality and sufficient in area to compensate the tribes for the land on the Fort Berthold Indian Reservation inundated by the construction of the Garrison Dam.<sup>317</sup> The JTAC interpreted this congressional standard as holding that only 'in-kind' or substitute compensation would fairly compensate these Indian peoples for the loss of their lands."<sup>318</sup>

The JTAC's next task was to determine what amount of replacement or substitute value would adequately compensate the Indians for the taking of their lands. Such an alternate valuation standard had been endorsed by the Supreme Court in the taking of lands that served essential governmental or public welfare functions. That the Indians' taken lands provided the social welfare and governmental benefits described by the Court was evidenced by their use of those lands for tribal farming and ranching activities as contemplated by the 1886 agreement. Only the continued existence of these lands, or the just compensation equivalent, would enable the affected Indians to fulfill those treaty-defined goals.

The JTAC issued its final report in 1986 and recommended that the Secretary of Interior propose federal legislation on be-

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<sup>315</sup> *Id.*

<sup>316</sup> *Three Affiliated Tribes and Standing Rock Sioux Tribal Equitable Compensation Act of 1991: Hearings on S. 168 Before the Select Comm. on Ind. Affairs*, 102d Cong. 16-19 (1991) [hereinafter *Hearings on S. 168*] (statement of Kent Conrad, U.S. Senator).

<sup>317</sup> NORTH DAKOTA HISTORY 251-52 (Ray H. Mattison ed., 1968).

<sup>318</sup> S. REP. NO. 102-250, at 3 (1992).

half of the Mandan, Hidatsa and Arikara peoples that would award them just compensation for the 1949 taking of the Fort Berthold Reservation.<sup>319</sup> The JTAC recommended that the just compensation amount should range between \$178.4 million and \$411.8 million. In calculating compensation, the JTAC had directed Dr. Cummings to use two alternative formulas. The JTAC's award range reflects the application of the alternative valuation formulas.<sup>320</sup>

*e. The Mandan, Hidatsa and Arikara Peoples Confront the Challenge of Social and Economic Recovery on the Fort Berthold Indian Reservation*

Interior Secretary Hodel declined to accept the JTAC report or implement any of the commission's recommendations. Instead, the Senate Select Committee on Indian Affairs and the House Interior Subcommittee on Water and Power initiated joint oversight hearings on the JTAC's final report in 1986.<sup>321</sup> The JTAC's just compensation recommendation was referred by the Select Committee to the General Accounting Office (GAO) for its analysis and response. The GAO report, issued in 1990, concluded that, although it somewhat disagreed with the economic methodology used by the JTAC, the JTAC's findings provided a substantial basis for Congress to consider an equitable award of just compensation to the Indians in the amount of \$149.5 million.<sup>322</sup> Legislation to implement the JTAC's just compensation recommendation was introduced by Senator Kent Conrad from

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<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> The Senate report accompanying S. 168 notes that the Senate Select Committee on Indian Affairs held three oversight hearings on the JTAC recommendations beginning on March 31, 1987, with a joint oversight hearing with the Senate Energy and Natural Resources Committee and the Water and Power Subcommittee of the House Committee on Interior and Insular Affairs. This hearing examined the need for legislation to implement the recommendations of the JTAC report. The second hearing was held on November 19, 1987, wherein the committees "urged" the Tribes to provide "further justification for the level of additional financial compensation to which they felt they were entitled" and "explore a budget neutral means to finance the compensation needed to carry out the recommendations." The third hearing was held regarding S. 168 wherein the tribes "expressed their overall support for the bill" and the GAO "expressed its approval of the compensation figures set forth in [S. 168]." *Id.*

<sup>322</sup> See Government Accounting Office (GAO), *Report to the Chairman, Select Committee on Indian Affairs, U.S. Senate Indian Issues: Compensation Claims Analysis Overstates Economic Losses* (1991).

North Dakota.<sup>323</sup> It provided \$149.5 million in just compensation to the Mandan, Hidatsa and Arikara peoples for the 1949 Fort Berthold taking. The BIA testified that it had no opposition to this legislation as long as it otherwise met the “pay-as-you-go” constraints of the controlling budget resolution.<sup>324</sup>

The Indians, after lengthy discussion with various interested groups, including the National Rural Electric Cooperative Association, were able to craft an agreement that would authorize the deposit of a specified amount of Pick-Sloan hydropower receipts into a Treasury account on behalf of the Mandan, Hidatsa and Arikara peoples.<sup>325</sup> The Indians were required to submit an economic and social recovery plan to the Interior Secretary that would govern the future expenditure of the just compensation monies. The Indians would have access to the accumulated interest on that account once it reached the amount of \$149.5 million. President Bush threatened to veto the legislation but, nonetheless, signed the Act into law in November 1992 as part of a larger water resources development bill.<sup>326</sup>

*E. The “Disjunctive” Moment: How the Mandan, Hidatsa and Arikara Peoples May Achieve Social and Economic Recovery on the Fort Berthold Reservation*

The Mandan, Hidatsa and Arikara peoples have survived much over the past two hundred years since their first encounter with American power in the late fall of 1804 during their tribal council meetings with the leaders of the American Corps of Discovery, Captains Meriwether Lewis and William Clark. They now confront a new “disjunctive” moment in their collective life as an Indian people. Can they effectively use the \$149.5 million in just compensation to reverse history and recover socially and economically as a distinct people? Unlike the “one-shot” tribal decision to “per-cap” the entire \$7.5 million in compensation in the 1957 tribal referendum, the “pay-out” structure of the governing statute and the congressional constraints on the use of the

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<sup>323</sup> See *Hearings on S. 168*, *supra* note 316, at 13-15.

<sup>324</sup> The BIA representative testified that if the “Budget Enforcement Act provisions can be complied with . . . the administration would look at that and give consideration to the additional compensation.” *Id.* at 32 (statement of Patrick A. Hayes, Bureau of Indian Affairs representative).

<sup>325</sup> *Id.*

<sup>326</sup> Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, 106 Stat. 4600.



\$149.5 million precludes any such self-interested solution to this disjunctive moment. Like it or not, the governing statute distributes only the accrued interest from this trust fund on an annualized basis to the tribal people. They will therefore be forced again and again to collectively re-decide the best use of that distributed interest income for their economic and social recovery as a tribal people.<sup>327</sup>

As “repeat players,” the various tribal constituencies, who favor competing social and economic recovery projects, will be forced to build tribal coalitions and alliances so as to convince the Interior Secretary that a majority of the Indian people support their particular approach to social and economic recovery on the Fort Berthold Reservation. There is some evidence that such a process is already underway among the Mandan, Hidatsa and Arikara peoples. Between 1992 and 1999, the accrued annual interest on this fund of \$149.5 million accumulated \$33 million. The pending secretarial distribution of this large sum of money has prompted much heated discussion among various tribal constituencies as to the appropriate use of this money for social and economic recovery purposes.<sup>328</sup>

The current tribal business council has proposed a plan for investing \$30 million of the money in a tribal endowment fund that would be managed by a private investment firm. It promises that this investment will earn an expected annual interest rate of 10% compared to the 6.5% annual rate of interest that they would earn if they are administered by the Office of Trust Funds Management (OTFM). Under the tribal council’s plan, about 50% of the annual income would be made available for tribal programs consistent with its proposed social and economic recovery plan.<sup>329</sup>

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<sup>327</sup> Section 3504(a)(4) of the Act provides that “[s]uch interest shall be available [to the Three Affiliated Tribes] . . . for use for educational, social welfare, economic development, and other programs, subject to the approval of the Secretary.” Section 3506 provides that “[n]o part of any moneys in any fund, under this title shall be distributed to any member of the Three Affiliated Tribes . . . on a per capita basis.”

<sup>328</sup> An opinion letter by Mr. Jerry Nagel, a tribal member and vice-chairman of the Fort Berthold Land Owners Association, challenged the proposed tribal investment plan. His letter states that “the council wants a dowery for themselves not an endowment for [the tribal members].” He continues, saying that the proposed tribal referendum on this plan presents the tribal members with an option to “vote to get 25% of nothing or 50% of nothing and the council gets 100% to spend at will.” (on file with author).

<sup>329</sup> *Id.*

But the proposed plan also authorizes the tribal business council to invade the fund's corpus and use up to 25% of its principal as security for any borrowing authorized by the tribal council. This provision has been greeted with skepticism by many tribal members. They question whether stepping away from federal trust management of this major tribal resource is a good idea. Some fear that this is a "power-grab" by a potentially corrupt tribal council that would misuse these tribal funds for personal benefit. Other tribal members fear that approval of such a plan would motivate individuals to "get on the council" so that they can invade proposed endowment funds for their own pet projects.<sup>330</sup>

This internal tribal controversy over the use of this \$33 million, far from dismaying anyone, should evidence the catalytic moment wherein the Mandan, Hidatsa and Arikara peoples strive to reclaim responsibility for their economic and social futures. It is a daunting task, but only these Indian peoples can successfully re-internalize those values, needs and circumstances that brought them together originally as the Three Affiliated Tribes. Indeed, this \$149.5 million may serve as the crude surrogate for those values as these Indian peoples seek to reconstitute their society so as to accomplish social and economic recovery.<sup>331</sup> No doubt, some of these funds will be misspent or foolishly invested by future tribal councils, but that is to be expected and absorbed as corrective guidance for future collective action. The "social discount" rate governing the impact of such expected tribal mistakes lowers their cost to near zero over these Indian peoples' long-term future.<sup>332</sup>

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<sup>330</sup> Ms. Phyllis Old Dog Cross articulates some of these concerns in her letters to Senator Byron Dorgan (D. N.D.). She asks the Senator to investigate the proposed "referendum election now being held by the Tribal Council of the Three Affiliated Tribes." She believes the plan is "not a wise move" and asks whether the "funds, principle [sic] and interest [are] being protected as well as invested right now?" (on file with author.)

<sup>331</sup> Other Indian peoples, such as the Makah people along the Puget Sound in Washington, focus more directly on the restoration of ancient cultural and economic practices, such as the hunting and harpooning of five to six grey whales annually, as the means of re-engaging their young people with the central reality of their people's heritage.

<sup>332</sup> Many Indian peoples seek to evaluate a present choice from the standpoint of the "Seventh Generation." This practice impresses on the minds of today's Indian leaders that the effects of their actions may well irredeemably mark the remote futures of, as yet, unborn Indian children.

*1. How This Disjunctive Moment Will Support the Renewal of the Mandan, Hidatsa and Arikara Peoples*

Over the past two hundred years the Mandan, Hidatsa and Arikara peoples have become enfolded into a non-Indian historical process from which they may now have the opportunity to escape. Moreover, their conscious assumption of their economic and social recovery task will lift them outside of this historical process.

Because these Indian people have been enveloped for so long within a dependency-generating historical process, they will have to expend a great deal of collective social and emotional energy to escape. They should perhaps listen to my young daughter's preschool song about successfully confronting an obstacle that is "too deep to go under it, too wide to go around it, too high to go over it, so I guess we'll have to go through it."

By penetrating this veil of a burdening American historical experience, the Mandan, Hidatsa and Arikara peoples can restore their distinctive character within a radically resituated Fort Berthold Reservation. By much expenditure of social and emotional energy, these Indian peoples can redefine their place within the evolving societal mosaic of America. Such conscious self-exertion marks the classic strategy of the Indian peoples in carving out a place for themselves within an often hostile American society.<sup>333</sup>

The Mandan, Hidatsa and Arikara people, in embarking on their path of social and economic recovery, must confront the high psychic and social costs imposed on their peoples by the accumulated effects of their American historical experience. Cross-cultural psychologists characterize the "spiritual injury" caused by "inter-generational post traumatic stress disorder" as a "soul wound."<sup>334</sup>

Converting this \$149.5 million into an effective therapy requires the development of strategies that will directly address the

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<sup>333</sup> Regaining what Anthony Giddens calls the "human agency of control" over one's own life experiences has fueled Indian peoples' resistance to the hegemonic influence of federal Indian law over their collective and individual lives. Federal Indian law is, among other things, a "symbolic order" that has long sought to "dominat[e] . . . the everyday context of [Indians'] lived experience." By disrupting the federal government's effort to "connect signification and legitimation" of such hegemonic efforts, the Indian peoples' have been able to survive federal Indian law. MUMBY, *supra* note 274, at 82-83.

<sup>334</sup> See, *supra* notes 271-72 and accompanying text.

assorted maladies that evidence the “soul wound” to the Mandan, Hidatsa and Arikara peoples. This will be the major task for collective action by these Indian peoples as they pursue social and economic recovery on the Fort Berthold Indian Reservation. Can this money effectively catalyze the deliberative social action necessary to “break” the inter-generational transmission of societal trauma within this Indian society?<sup>335</sup>

## 2. *Catalyzing the “New Constitution” for the Mandan, Hidatsa and Arikara Peoples*

The repeated and necessary confrontations among powerful tribal constituencies in constructing effective social action on the Fort Berthold Reservation will eventually result in a new constitution for the Three Affiliated Tribes. This new constitution will reconnect these contesting tribal constituencies with a renewed understanding of their peoples’ latent and emerging values. At a pragmatic and instrumental level, these confrontations will distill these values and understandings into socially-accountable political expression requiring effective and responsive institutions of governance. At a societal level, these confrontations will progressively re-embed the tribal government within a renewed tribal identity. Only through such a reconstitutionalizing effect will they reclaim their tribal institutions from their imposed, Americanized functions under John Collier’s IRA and federal Indian common law.<sup>336</sup>

I will offer only general guidelines for this task: to do more would unduly intrude into the free sovereign choice of these Indian peoples. My recommendations draw upon A. K. Sen’s recent constructive approach to social governance as the essential means for realizing human freedom. First, such a tribal constitution would consciously promote the full development of the human capabilities of individual tribal members by according them appropriate opportunities for meaningful social and political participation. Second, such a tribal constitution would explicitly promote the growth of traditional tribal constituencies and

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<sup>335</sup> *Id.*

<sup>336</sup> By restoring “narrative capacity” to the Indian peoples, they are removed from the “strategies of containment” evidenced in federal Indian law decisions. Federal Indian law accomplishes its goal by imposing a “sense of determinacy on the [Indian] social actor’s world, simultaneously obscuring ways in which reality is *over* determined; that is, structured by the underlying relations of power that place *material* limitations on how social reality is framed.” MUMBY, *supra* note 274, at 106.

encourage the articulation of their interests and values in a socially-comprehensible manner. Third, such a tribal constitution would require the ruling tribal leadership to demonstrate that it "hears" their peoples' demands and needs by responding in a politically and socially accountable manner.<sup>337</sup>

Two additional background requirements provide the context for the "working-out" of this new tribal constitution. First, these Indian peoples must consciously reject what Professor Mary Midgley calls the paralyzing "menace of fatalism."<sup>338</sup> This fatalism is embodied in the prevailing American view that innate genetic, cultural or biological factors have doomed the contemporary Indian societies to decline and eventual disappearance. Many Indian people, including some on the Fort Berthold Indian Reservation, have "bought into" this view. Only by consciously rejecting such fatalism about their future as an Indian people will the Mandan, Hidatsa and Arikara people avoid a paralysis of the needed action.<sup>339</sup>

Second, the Indian people must adopt the principle of "enoughness" as expressing their confidence that they can effectively use their existing material and social resources in defining and meeting their pressing social and economic recovery needs. Only by presuming that \$149.5 million can be subdivided into enough societal resources—income, food, power, prestige and authority—to meet their peoples' needs in a socially accountable manner, will this reconstitutionalizing process succeed on the Fort Berthold Reservation. This principle requires future tribal councils to prudently "grow" this \$149.5 million in a manner that creates a sustainable "steady-state" tribal economy so as to ensure the fair and equitable distribution of societal resources.<sup>340</sup>

### III

#### CONCLUSION: RECONCILIATION

Reconciling the past two hundred years of federal-Indian relations requires the American and Indian peoples to escape from a "history that no one wanted."<sup>341</sup> This history, embodied in its

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<sup>337</sup> See SEN, *supra* note 275, at 145-59.

<sup>338</sup> MARY MIDGLEY, WICKEDNESS: A PHILOSOPHICAL ESSAY 93-98 (1984).

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> DENNIS M. WRONG, THE PROBLEM OF ORDER: WHAT UNITES AND DIVIDES SOCIETY 236-43 (1994).

main engine—federal Indian law—still seeks to remake the Indian peoples by altering their somatic features, languages, territorial distributions, governmental institutions, as well as their cultural and religious belief-systems. This history has damaged, and continues to damage, the American and Indian peoples in fundamental ways. It has demeaned, and continues to demean, a proud and accomplished people, the American people, who, to create this history, openly flouted their most basic and cherished tenets of life, liberty and happiness for all Americans. It has proven unduly destructive of the lives and resources of the Indian peoples, the American people's ostensible wards entitled to their solicitude and protection. It has proven to be a yahoo's history of the American West and only yahoos would wish it to continue.<sup>342</sup>

Why this unwanted history is so tenaciously and continually reproduced in federal Indian law decisions requires us to look at its generative source. Freud viewed its generative source in this manner:

Men are not gentle creatures who want to be loved, and who at most can defend themselves if attacked; they are, on the contrary, creatures among whose instinctual endowments is to be reckoned a powerful share of aggressiveness. As a result, their neighbor is for them not only a potential helper or sexual object, but also someone who tempts them to satisfy their aggressiveness on him, to exploit his capacity for work without compensation, to use him sexually without his consent, to seize his possessions, to humiliate him, to cause him pain, to torture and kill him, *Homo homini lupus*. Who in the face of all his experience of life and of history, will have the courage to dispute this assertion? As a rule this cruel aggressiveness waits for some provocation or puts itself at the service of some other purpose, whose goal might also have been reached by milder measures. In circumstances that are favorable to it, when the mental counter-forces which ordinarily inhibit it are out of action, it also manifests itself spontaneously and reveals man as a savage beast to whom consideration towards his own kind is something alien. Anyone who calls to mind the atrocities

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<sup>342</sup> Nathan Glazer quotes the historical musing of one such yahoo, Teddy Roosevelt, who concludes in his history of *The Winning of the West* that:

Looking back, it is easy to say that much of the wrong-doing could have been prevented; but if we examine the facts to find out the truth, not to establish a theory, we are bound to admit that the struggle could not possibly have been avoided . . . Unless we were willing that the whole continent west of the Alleghenies should remain an unpeopled waste, the hunting ground of savages, war was inevitable.

Glazer, *supra* note 43, at 12-13.

committed during the racial migrations or the invasion of the Huns, or by the people known as Mongols under [Genghis] Khan and Tamerlane, or at the capture of Jerusalem by the pious Crusaders, or even, indeed the horrors of the recent World War—anyone who calls these things to mind will have to bow humbly before the truth of this view.<sup>343</sup>

This unwanted history and its child, federal Indian law, were born out of such a crucible of national aggression exalted by Teddy Roosevelt and others. This history remains fresh in the minds of its adherents only through its constant re-enactment. Thus the new “Indian wars” are now cast as legal struggles over Indian land, sovereignty and beliefs. These ritualized aggressions allow a new American generation to renew their mythic kinship ties, forged long ago in the heat, blood and sweat of their remote ancestors’ wars to dispossess the Indian peoples. Not surprisingly, Freud concluded that such a history of “ethnic nationalism” becomes the means by which law embodies and re-enacts the aggressive instincts of its people so as to enable their identification and reinforce their loyalty to the state:

[The] state has forbidden the practice of wrong-doing, not because it desired to abolish it, but because it desires to monopolize it, like salt and tobacco. The warring state permits itself every such misdeed, every such act of violence, as would disgrace the individual man.<sup>344</sup>

This history renders, for me, banal the efforts of contemporary legal commentators to remake federal Indian law via critique.<sup>345</sup> Even if successful in its own terms, it reinforces what Erik Erikson calls the “pseudo-speciation” of a group: in this case, of Indian peoples as tribes. Only a new history, not the yahoo’s history of the American West, created by the Indian peoples themselves will serve to rebuild their lives, cultures and economies.<sup>346</sup>

Some argue that this old American history is already in eclipse and that a new American history is waiting to be born. Some will mourn, like James Truslow Adams who published *The Epic of America* in 1931, this passing of the old America.<sup>347</sup> He spoke of

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<sup>343</sup> WRONG, *supra* note 341, at 141.

<sup>344</sup> *Id.* at 174.

<sup>345</sup> See Robert A. Williams, Jr., *Columbus’s Legacy: The Rehnquist Court’s Perpetuation of European Cultural Racism Against American Indian Tribes*, 39 FED. B. NEWS & J. 6 (1992).

<sup>346</sup> WRONG, *supra* note 341, at 181.

<sup>347</sup> Glazer, *supra* note 43, at 16.

## America as:

That dream . . . has evolved from the hearts and burdened souls of many millions, who have come to us from all nations. If some of them have too great faith, we know not yet to what faith may attain, and may harken to the voice of one of them, Mary Antin, a young immigrant who comes to us from Russia. . . . Sitting on the steps of the Boston Public Library, where the treasures of the whole of human thought had been opened to her, she wrote: "This is my latest home, and it invited me to a glad new life. . . . The past cannot hold me, because I have grown too big; just as the little house in Polotzk, once my home, has now become a toy of memory, as I move about in the wide spaces of this splendid palace. . . . America is the youngest of nations, and inherits all that went before it in history. And I am the youngest of America's children, and into my hands is given all her priceless heritage. . . . Mine is the whole majestic past, and mine is the shining future."<sup>348</sup>

A noted Harvard sociologist, Nathan Glazer, characterizes this newborn American history as one fraught with doubts, hesitations and fears, just as its old history was characterized by optimism, confidence and a boundless sense of American power:

This brings us up to date in considering America as epic. The epic of the frontier closed a long time ago. Many have worried about what succeeds it. Let us project America overseas, some have said, in imperialist conquest, or in fighting tyranny, or in improving the life of other peoples. We have now withdrawn from the empire, though a few places remain. We face no great tyranny, and our will in facing even small tyrannies is not strong. We are now doubtful about our capacity to improve the lives of other peoples. The new frontier, we are told, must be education, or space, or good group relations. How often have we heard it said: How come we can reach the moon and not improve our cities or race relations? Clearly it must be easier to reach the moon, and that does require heroes and is a subject of epic stature. I doubt whether the improving of group relations can replace the conquest of a continent as the subject of an epic. Of course, we can live without an American epic. But that does diminish us, and it is easy to understand why some of our poets, artists, writers and historians keep on trying.<sup>349</sup>

Any new American epic of history would be radically incomplete, in my mind, without a prominent place reserved for the Indian peoples. They are rich in those redemptive social and cul-

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<sup>348</sup> *Id.* at 18.

<sup>349</sup> *Id.* at 20.



tural beliefs and practices that “hold societies together.”<sup>350</sup> These are the precise affiliative resources that the American people have lost—families, small groups and networks of interacting individuals cooperating in the pursuit of common goals.<sup>351</sup> Whereas Americans of all ages are actively encouraged to economically and socially embrace the increasingly abstract relations of the new “bio-cybernetic” society,<sup>352</sup> the Indian peoples—insulated by poverty, by remoteness and by their legal status as tribes—have the opportunity to reinvigorate their “flesh and blood” life-worlds.

Because there is no “off-ramp” from America’s information society into Indian Country, the Federal Communication Commission (FCC) has been directed by Congress to build an information bridge into the Indian peoples’ lives.<sup>353</sup> But the Indian peoples are not asking for such an information technology to enrich their lives. Instead they are simply asking for the freedom promised by the old America, a freedom not granted to the Indian peoples. Or, in response to the new America’s offer of information technologies, some of the older Indians may say, as Kant did long ago, the only information that really matters for human use is already encoded in the “hieroglyphs of the heart.”<sup>354</sup>

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<sup>350</sup> WRONG, *supra* note 341, at 242.

<sup>351</sup> *Id.*

<sup>352</sup> Anthony Giddens clearly distinguishes between “social integration” and “systems integration”:

With the development of abstract systems, trust in impersonal principles, as well as in anonymous others, becomes indispensable to social existence. Nonpersonalized trust of this sort is discrepant from basic trust. There is a strong psychological need to find others to trust, but institutionally organized personal connections are lacking, relative to pre-modern social situations. . . . Routines which were previously part of everyday life or the “lifeworld” become drawn off and incorporated into abstract systems . . . . Routines which are structured by abstract systems have an empty, unmoralised character—this much is valid in the idea that the impersonal increasingly swamps the personal.

WRONG, *supra* note 341, at 233-34.

<sup>353</sup> But the FCC’s order of June 20, 2000, seeking to promote universal service within Indian Country, will likely fail because of the threshold requirement that Indian tribes demonstrate state authority to designate and regulate communication carriers serving tribal lands has been preempted by federal law. Jennifer L. King, *Increasing Telephone Penetration Rates and Promoting Economic Development on Tribal Lands: A Proposal to Solve the Tribal and State Jurisdictional Problems*, 53 FED. COMM. L.J. 137, 140-41 (2000).

<sup>354</sup> JOHN DURHAM PETERS, *SPEAKING INTO THE AIR: A HISTORY OF THE IDEA OF COMMUNICATION* 254 (1999).